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IN THE

# Supreme Court of the United States

*October Term, 1940*

No. 139

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
*Petitioners,*

*vs.*

ROCKWELL LIME COMPANY, et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

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IN THE

# SUPREME COURT OF THE UNITED STATES

*October Term, 1940*

No. .....

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
*Petitioners,*

*vs.*

ROCKWELL LIME COMPANY, et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

**MAY IT PLEASE THE COURT:**

The petition of the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company respectfully shows to this Honorable Court:

## A.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

The fundamental question here presented is whether administrative determinations and orders of the Interstate Commerce Commission and state commissions, in this instance the Illinois Commerce Commission, in a joint hearing authorized by section 13 (3) of the Interstate Commerce

Act (49 U. S. C. 13 (3)), wherein, as this Court said in *United States* v. *Chicago Heights Trucking Co.*, ..... U. S. ....., May 20, 1940, the Commissions were acting in their capacity as public agencies and carrying out duties imposed by the Congress in the interest of shippers generally, the national transportation and the public interest, can be defeated and set aside collaterally by state courts.

The judgment of the Supreme Court of Illinois, the highest court of that state, affirms a judgment of the Circuit Court of Cook County entered on March 23, 1939, setting aside an order entered by the Illinois Commerce Commission dismissing a complaint filed on behalf of respondents herein on September 21, 1928, seeking damages for collection of alleged illegal rates on carload shipments of sand and gravel during the period September 10, 1925, to February 15, 1927, to Chicago from origins on the Chicago and North Western and the Chicago, Milwaukee, St. Paul and Pacific, commonly known as the Milwaukee, in what is known as Zone I of the rate structure on sand and gravel in this territory.

The judgment of the Circuit Court, which was affirmed by the Supreme Court, directs the Illinois Commission to require petitioners to make restitution in connection with shipments moving during that period, in disregard of the fact that respondents' contentions were found without foundation by two administrative bodies, viz., the Interstate Commerce Commission and the Illinois Commerce Commission, in concurrent orders entered under authority of section 13 (3) of the Interstate Commerce Act under date of November 30, 1926 (Ex. 4; R. 51, 93-134; Ex. 6; Rec. 52, 147-164), and again by the Illinois Commission in the order of dismissal entered herein under date of January 4, 1933, in a separate and subsequent proceeding (R. 2-17), to all of which proceedings respondents herein were parties. (R. 50-51.)

On December 18, 1925, a complaint was filed with the Illinois Commission which became known as Docket 15878, *Chicago Gravel Co.* v. *A. T. & S. F. Ry. Co.*, referred to hereinafter as the *Illinois Chicago Gravel case.* The complaint, among other things, placed in issue the refusal of the Chicago and North Western and the Milwaukee to comply with the Illinois Commission's suspension order No. 15539 as to rates for intrastate transportation from Zone I to deliveries in Chicago. Reparation for alleged overcharges was sought. The complaint prayed also that the Illinois Commission consolidate the hearing of suspension order 15539 with the hearing requested in the complaint, and, after reciting that a similar complaint was being filed with the Interstate Commerce Commission, requested further that the Illinois Commerce Commission and the Interstate Commerce Commission proceed to a joint hearing. (R. 135-146)

Responsive to the request just referred to, the complaint in Illinois Dockets 15878, 15539, and 15191, collectively referred to herein as the *Illinois Chicago Gravel case*, and the complaint in Interstate Commerce Commission Docket 17817, *Chicago Gravel Co.* v. *A. T. & S. F. Ry. Co.*, later reported in 118 I. C. C. 633, and referred to herein as the *Chicago Gravel case*, were heard by the Illinois Commission on the same record and in a joint hearing with the Interstate Commerce Commission and the Public Service Commission of Indiana, as contemplated by section 13 (3) of the Interstate Commerce Act. Respondents herein were parties to that proceeding. (R. 50-51) Subsequently, on November 30, 1926, after an extensive and full hearing, concurrent reports and orders were entered by the Interstate Commerce Commission and the Illinois Commission in which the matters and issues tendered in the complaint in the *Illinois Chicago Gravel case* were decided adversely to respondents herein. (Ex. 4 and 6; R. 51-52, 93-134, 147-164)

The Interstate Commerce Commission found (Ex. 4; R. 51, 93-106) in its report and order in *Chicago Sand & Gravel Producers* v. *Director General,* 64 I. C. C. 37, decided September 23, 1921, hereinafter referred to as the *Chicago Producers case,* that the rate from points in Zone II on the Milwaukee and the Chicago and North Western for both state and interstate application to Chicago should be on a parity, fixed a differential of 5 cents* to be maintained Zone II over Zone I, and prescribed a rate basis for deliveries on connecting lines in Chicago. Maximum rates as modified by the general reduction of 1922 were 70 cents from Zone II and 65 cents from Zone I. During the process of publishing the general reduction of 1922 these rates erroneously had been published as 65 cents from Zone II and 60 cents from Zone I. (R. 104) The railroads constructed an adjustment of rates in this territory, applying the principles and within the framework of the Commission's findings and order in the *Chicago Producers case,* and filed tariffs with the Interstate Commerce Commission, the Illinois Commission, and the Public Service Commission of Indiana to become effective September 10, 1925. These tariff schedules named a single line rate from Zone I of 65 cents and 70 cents from Zone II, thus preserving the required differential of 5 cents Zone II over Zone I, and the measure of the rate found reasonable by the Interstate Commerce Commission. (R. 104) Protests were filed by certain producers against these rates. The Interstate Commerce Commission and the Indiana Commission declined to exercise their powers of suspension, but the Illinois Commission issued an order hereinbefore referred to as Docket 15539 purporting to suspend this rate adjustment so far as its intrastate application within Illinois was concerned. (R. 105)

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* Rates and differences in rates are stated in amounts per ton of 2,000 pounds.

In its concurrent order of November 30, 1926, in the *Chicago Gravel case* the Interstate Commerce Commission, among other things, found that (1) the finding and order in the *Chicago Producers case* applied to intrastate traffic from Zone I; (2) the order of that Commission in the *Chicago Producers case* was still outstanding; (3) the suspension order of the Illinois Commission did not become effective against the Chicago and North Western and the Milwaukee; (4) the rates referred to therein, among others 65 cents from Zone I to Chicago, became effective interstate, intrastate within Indiana, and intrastate within Illinois on the Chicago and North Western and the Milwaukee. (Ex. 4; R. 51, 103-105, 124)

It was admitted in the record before the Illinois Commission in the instant case by respondents' witness that if the Chicago and North Western and the Milwaukee had executed the suspension orders of the Illinois Commerce Commission there would have been a greater rate difference than 5 cents between Zone I and Zone II and there would have been instead of a parity a difference of 5 cents between Illinois origins and Wisconsin origins in Zone II. The witness asserted that the Chicago and North Western and the Milwaukee could have maintained a differential relationship by voluntarily suspending interstate rates. (R. 46-47)

The concurrent report and order of the Illinois Commission entered under date of November 30, 1926, is in this record as Exhibit 6. (R. 52, 147-164) Among other things there found is that the decision of the Interstate Commerce Commission in the *Chicago Gravel case* clearly sets forth pertinent facts of record; that the Interstate Commerce Commission, the Public Service Commission of Indiana, and the Illinois Commission had had several conferences in an endeavor to harmonize interstate and intrastate rates, and this it was believed had been accomplished in such a way as to avoid the exaction of unjust, unreasonable or

discriminatory rates. (R. 154-155) The Illinois Commission further found (R. 155-156) that the charges collected were not unjust, unreasonable or unduly discriminatory, and denied the prayer for reparation. (R. 156, 163)

The Illinois Commission also fixed 65 cents as a reasonable rate from Zone I, which was the exact measure of the base rate applied by petitioners during the period here involved. (R. 157) Both the Interstate Commerce Commission (R. 123-124) and the Illinois Commission (R. 157) in the *Chicago Gravel case* found reasonable and otherwise lawful base rates of 65 cents from Zone I and 70 cents from Zone II, making a differential between the two zones of 5 cents.

The judgment of the Supreme Court herein in effect requires the Illinois Commission to apply retroactively for the period here involved and for the sole benefit of respondents a rate of 60 cents from Zone I. This would result in respondents' rates being reduced retroactively, whereas rates of other intrastate shippers from Zone I would remain at 65 cents. Rates of all interstate and intrastate shippers from Zone II would remain at 70 cents. For respondents the differential between Zones I and II would be 10 cents and for all other shippers, both interstate and intrastate, 5 cents. (R. 123-124, 157-158.)

Contemporaneously with the filing of the complaint with the Interstate Commerce Commission in the *Chicago Producers case* a complaint was filed with the Illinois Commission placing in issue intrastate rates within the same territory, *Chicago Sand and Gravel Producers, et al.*, v. *A. T. & S. F. Ry. Co., et al.*, and received the docket number of 10666. That proceeding was heard on the same record with Docket No. 15311, *Wisconsin Lime & Cement Co.* v. *Chicago and North Western Ry. Co., et al.*, Docket No. 15211, *Fisk Material & Coal Co.* v. *Chicago and North Western Ry. Co.*, and Docket No. 15505, *Chicago Fire Brick Co.* v. *Chicago*

*and North Western Ry. Co.*, collectively referred to hereinafter as the *Illinois Chicago Producers case*. By agreement of all parties (R. 175), the record made at the hearings before the Interstate Commerce Commission in the *Chicago Producers case* was made a part of the record in the cases just described.

Six of the respondents herein were parties to the *Illinois Chicago Producers case*. (R. 165-173)

Under date of July 16, 1930, the Illinois Commission entered a report and order, which found, among other things, that it was without jurisdiction within the territory covered by the order in the *Chicago Producers case*. (Ex. 7; R. 52, 165-196.)

Respondents herein made no effort to obtain a review of the order of the Interstate Commerce Commission in the *Chicago Producers case* as construed and applied in the *Chicago Gravel case*, in the manner provided by law (Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220), nor did they prosecute an appeal from the order of the Illinois Commission entered under date of November 30, 1926, in the *Illinois Chicago Gravel case* or from the order of the same Commission entered under date of July 16, 1930, in the *Illinois Chicago Producers case*.

Respondents, without pursuing a direct review of the aforesaid orders, filed the complaint herein with the Illinois Commission on September 21, 1928, wherein the substance of what has been stated above as to the allegations of their complaint in the *Illinois Chicago Gravel case* concerning petitioners' failure to comply with the Illinois Commission's suspension order 15539 was repeated. (R. 23)

Petitioners' amended answer and motion to dismiss (R. 29-32) set forth in substance the proceedings, reports, and orders of the Interstate Commerce Commission in the *Chicago Producers case*, the *Chicago Gravel case*, and of the Illinois Commerce Commission in the *Illinois Chicago*

*Gravel case.* The amended answer and motion to dismiss stated further that the order of the Interstate Commerce Commission in the *Chicago Producers case,* effective January 5, 1922, provided in terms that it should continue until the further order of the Commission, and that ever since the effective date it had been in full force and effect.

To defendants' answer and motion to dismiss complainants filed a reply under date of November 21, 1928. The reply, however, did not deny that the Interstate Commerce Commission's order in the *Chicago Producers case* was issued and was continuing in character. The reply in its nature was one of confession and avoidance, in that it asserted that the order was silent in regard to Illinois inner zone rates and the order was void. (R. 32-37.)

The Illinois Commission in its order entered under date of January 4, 1933, dismissing the complaint herein found that petitioners were confronted with conflicting orders, one from that Commission requiring them to suspend certain increases in rates and another from the Interstate Commerce Commission ordering them to observe a certain differential from Zone I under the outer zone, and manifestly petitioners could not comply with both orders. (R. 15) The Illinois Commission further found that it was without jurisdiction to award reparation and thus override an order of the Interstate Commerce Commission. (R. 17, 230)

## B.

## BASIS OF JURISDICTION.

(*a*) Jurisdiction is sustained by section 237 (*b*) of the Judicial Code, as amended by act of February 13, 1925, 43 Stat. 936, 937 (28 U. S. C. sec. 344).

(*b*) There is drawn in question herein Article I, section 8, clause 3 of the Constitution of the United States extending to the Congress power to regulate commerce among the

several states and the validity of amended sections 41, 208, and 211, Judicial Code, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, sections 3, 13, and 15a of the Interstate Commerce Act, and rules prescribed by the Interstate Commerce Commission under authority of section 13 (3) of that act, and reports and orders of the Interstate Commerce Commission and of the Illinois Commerce Commission entered at a joint hearing contemplated by and under the authority of that act.

The Illinois statutes, particularly sections 32 to 39, inclusive, sections 64 to 73, inclusive, and section 76, Chapter 111-2/3, Illinois Revised Statutes, 1939, as applied by the Supreme Court of that state in reversing the state administrative body, are repugnant to the Constitution of the United States and the laws of the United States, including the Urgent Deficiencies Act of October 22, 1913, and the Interstate Commerce Act, and the paramount authority of the Congress exercised through its administrative agency, the Interstate Commerce Commission.

(*c*) Judgment of the Supreme Court of Illinois was entered under date of February 13, 1940. (R. 237-238) Timely petition for rehearing was filed by petitioners and denied by that court on April 3, 1940 (R. 238-239), less than three months prior to filing this petition for writ of certiorari.

(*d*) Cases sustaining jurisdiction are:

*Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447;
*Stoll* v. *Gottlieb*, 305 U. S. 165;
*American Express Co.* v. *Caldwell*, 244 U. S. 617, 628;
*Lancaster* v. *McCarty*, 267 U. S. 427;
*Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285;
*Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477;
*Grubb* v. *Public Utilities Comm.*, 281 U. S. 470.

The judgment of the Supreme Court of Illinois is a final judgment terminating this litigation on the merits. It affirms the judgment of the Circuit Court of Cook County, which reverses the order of the Illinois Commerce Commission dismissing the complaint and directs that Commission to award restitution to the respondents, leaving the Commission no administrative or other discretion and no opportunity to reexamine the questions presented. The judgment affords no basis for another appeal (R. 202-204). The law of Illinois, as construed by the Appellate and Supreme Courts of that state, does not permit an appeal by a railroad from an order entered by the Commission for the payment of money. *Medusa Portland Cement Co.* v. *Ill. Cent. R. Co.*, 287 Ill. App. 549. *Terminal R. R. Assn.* v. *Utilities Com.*, 304 Ill. 312. Cases holding that the judgment is final within the meaning of the statute relating to jurisdiction are:

*Ellis* v. *Int. Com. Comm.*, 237 U. S. 434;
*Clark* v. *Williard*, 292 U. S. 112;
*Knox Loan Assn.* v. *Phillips*, 300 U. S. 194;
*Laclede Gas Co.* v. *Comn.*, 304 U. S. 398;
*Cobbledick* v. *U. S.* — U. S. —, 84 L. Ed. 524.

## C.

## QUESTIONS PRESENTED.

The Federal questions sought to be reviewed herein were raised before the Illinois Commission in petitioners' amended answer and motion to dismiss (R. 29-32, 227-228), by similar motion to dismiss made at the beginning of the hearing (R. 41), and by renewal of the same motion after the completion of the taking of testimony. (R. 53) Under the law of Illinois (Sec. 72, Chap. 111-2/3, Ill. Rev. Stats., 1939) an appeal to the Circuit Court must be heard and determined upon the record made before the Illinois Commission.

The Federal questions were raised also upon appeal to the Supreme Court of Illinois in statement of errors contained in petitioners' brief filed with that Court* and made of record herein. (R. 219-223)

The Supreme Court of Illinois passed on the Federal questions adversely to respondents and denied Federal authority in the premises. That Court held in substance: (1) State courts have jurisdiction and power to review, construe, and apply orders of the Interstate Commerce Commission and to pass judgment on whether such orders are sufficiently definite and supported by adequate findings of fact (R. 232-233, 235); (2) state courts have jurisdiction and power to review collaterally proceedings before the Interstate Commerce Commission, to determine what was in issue therein and to make findings contrary to those made by that Commission (R. 232-233, 235); (3) orders of state commissions entered concurrently with orders of the Interstate Commerce Commission as the result of joint hearing authorized by the Congress in section 13 (3) of the Interstate Commerce Act are subject to collateral attack even by parties who were also parties of record in the joint hearing (R. 236); (4) concurrent reports and orders of the Interstate Commerce Commission and a state commission entered as the result of a joint hearing under section 13 (3) of the Interstate Commerce Act cannot be considered as evidence, although introduced of record (R. 229-236); (5) the subject matter of concurrent reports and orders of the kind just described is not clothed with public interest but is purely one for private litigation (R. 236); (6) an order of the Interstate Commerce Commission may be effectually annulled and set aside as the result of an alleged defect in proof in a collateral proceed-

* Under the practice in Illinois, no assignment of errors is filed with the Supreme Court of Illinois and included in the record of any case, this assignment being replaced by statement of errors incorporated in appellants' brief.

ing to which neither the United States nor the Interstate Comerce Commission is a party (R. 232-236). In substance the effect of the decision of the Supreme Court herein is that state courts have the power to review and to set aside and annul orders of the Interstate Commerce Commission.

The Federal questions sought to be reviewed are substantial and of public concern. So far as petitioners have ascertained, this Court has never had occasion to review or consider the policy of the Congress as set forth in section 13 (3) of the act relating to joint hearings with state commissions. If the decision of the Illinois Supreme Court is permitted to stand as a precedent for action by state authority, administration of the legislative policy of the Congress will be obstructed by requiring on demand of dissatisfied litigants retrial of administrative questions determined by concurrent orders and by requiring unusual and burdensome methods and standards of proof.

The decision is violative of principles emphasized by the Court in *U. S.* v. *Chicago Heights Trucking Co.*, ..... *U. S.* ....., May 20, 1940, that these administrative bodies, the Interstate Commerce Commission and the Illinois Commission, are informed by experience and they act as public agencies and carry out duties imposed by the Congress in the interest of shippers generally, the national transportation system and the public interest.

There can be no ordered and effective administration of the Interstate Commerce Act, and particularly section 13 (3), if state courts are permitted collaterally to set aside determinations and orders made as the result of joint hearings and to create preferences and prejudices and unjust discrimination by judicial fiat.

The law has been considered well established that state courts have no power or jurisdiction to construe, review and annul determinations and orders of the Interstate Com-

merce Commission. If the decision of the Illinois Supreme Court herein is permitted to stand it will encourage and tend to promote litigation in state courts concerning the authority of the Congress as exercised by its administrative agency, the Interstate Commerce Commission.

## D.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioners rely upon the following reasons for the issuance of the writ:

1. The Supreme Court of Illinois, in holding that concurrent reports and orders of the Interstate Commerce Commission and the Illinois Commission in a joint proceeding authorized by the Congress in section 13 (3) of the Interstate Commerce Act are not entitled to be considered as evidence although introduced of record, and in sustaining a collateral attack in the state courts upon orders of the Interstate Commerce Commission and the Illinois Commission, has decided a Federal question of substance not heretofore determined by this Court and has decided in a way not in accord with applicable decisions of this Court. If the decision herein of the Supreme Court of Illinois is permitted to become a precedent, the legislative policy and paramount authority of the Congress, as asserted in the Interstate Commerce Act, particularly section 13, will be obstructed and defeated by requiring on demand of dissatisfied litigants repeated retrials of matters administratively determined in such proceedings and by requiring methods and standards of proof more burdensome than usually required in administrative proceedings.

2. The decision is directly violative of principles applied by this Court in *U. S.* v. *Chicago Heights Trucking*

*Co.*, ..... U. S. ....., May 20, 1940, that the Interstate Commerce Commission and the Illinois Commission are expert bodies informed by experience and their acts were those of public agencies carrying out duties imposed by the Congress in the interest of shippers generally, the national transportation system and the public interest.

3. The Supreme Court of Illinois, in asserting the power and jurisdiction to review and pass upon the validity of orders of the Interstate Commerce Commission and in setting aside and annulling the orders of that commission involved herein, has failed to give recognition to the statutes of the Congress of the United States and has departed from applicable decisions of this Court in the premises, all of which will have the direct tendency to throw into confusion the orderly and effective administration of the Interstate Commerce Act and the exercise of the power of the Congress under Article I, Section 8, Clause 3, of the Constitution of the United States to regulate commerce.

4. The Supreme Court of Illinois, in addition to erring as above stated, erred as follows:

(1) In entering judgment the effect of which is to set aside and annul the order of the Interstate Commerce Commission in the *Chicago Producers case* as construed and applied in the *Chicago Gravel case,* notwithstanding the fact that the United States is not a party to this proceeding and could not be joined as a party, since under the provisions of amended sections 41, 208, and 211, Judicial Code, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, the United States has not consented to be sued in state courts and has authorized the commencement of such suits only in a specially constituted United States District Court.

(2) In considering the proceedings before the Interstate

Commerce Commission referred to herein as the *Chicago Producers case,* and *Chicago Gravel case,* and before the Illinois Commission as the *Illinois Chicago Gravel case,* and the *Illinois Chicago Producers case,* and the orders resulting therefrom as merely private litigation and in failing to give them effect as general in operation and thus binding on the public and binding upon respondents for the additional reason that they were parties to said proceedings. The effect of the Court's misapplication of the law is to create a preference in favor of respondents and to destroy the uniformity which federal and state statutes, and the administrative bodies created thereby, were designed to secure.

(3) In unlawfully interfering with findings and orders entered by two administrative bodies, the Illinois Commerce Commission and the Interstate Commerce Commission, determining the subject matter hereof adversely to respondents in a joint hearing authorized and contemplated by Section 13 of the Interstate Commerce Act.

(4) In entering judgment which creates undue and unreasonable advantages, preferences or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, and undue and unreasonable and unjust discrimination against interstate commerce, all in violation of the aforesaid provisions of the Constitution and statutes of the United States.

(5) In not giving legal effect to the undisputed fact that at the time involved petitioners were confronted with conflicting orders of the Interstate Commerce Commission, on the one hand, and the Illinois Commerce Commission, on the other hand, and they were bound by law to conform to the requirements of the Interstate Commerce Commission.

(6) In ignoring and giving no effect to the evidence of record, particularly petitioners' Exhibits 4, 5, 6, 7, and 8.

(7) In entering judgment in disregard of the fact that the proceedings before the Interstate Commerce Commission and the joint proceedings before that commission and the Illinois Commission and the lack of jurisdiction in the courts of Illinois were disclosed by the pleadings herein.

(8) In entering judgment upon a ground not set forth in the application for rehearing before the Illinois Commission.

(9) In ignoring the fact that the undisputed evidence shows that the Illinois Commission had full notice and actual knowledge of the order of the Interstate Commerce Commission entered under date of January 5, 1922, as subsequently construed and applied, and the Illinois Commission was not free to disregard said order but was bound by law to refrain from interfering with or infringing upon it in any respect.

(10) In ignoring the fact that under the issues and record upon this appeal, the rates charged must be conclusively regarded as reasonable for the transportation service rendered, and there is no theory upon which respondents lawfully could prevail.

(11) In entering judgment which, although based on an alleged defect in proof, in that the order of the Interstate Commerce Commission in the *Chicago Producers case* was not sufficiently established of record, directs the Illinois Commission as to its procedure on the merits and to require petitioners to make restitution to respondents.

(12) In failing to hold that the subject matter of respondents' cause herein is barred by the doctrine of administrative finality.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Illinois, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 25300, *Rockwell Lime Company, et al., Appellees,* v. *Chicago and North Western Railway Company, et al., Appellants,* and that the said judgment of the Supreme Court of Illinois may be reversed, and that your petitioners may have such other and further relief in the premises as to this Court may seem proper.

Dated at Chicago, Ill., June 5, 1940.

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C. S. JEFFERSON,
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IN THE

# SUPREME COURT OF THE UNITED STATES

*October Term, 1940*

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No. .....

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CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
*Petitioners,*

*vs.*

ROCKWELL LIME COMPANY, et al.,
*Respondents.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Illinois is reported in 373 Ill. 309, 26 N. E. (2d) 99, and is found at pages 225 to 237 of the record. No opinion was filed by the Circuit Court of Cook County. The finding and judgment of that court is set forth at pages 202 to 204 of the record. The report and order of the Illinois Commerce Commission entered under date of January 4, 1933, dismissing the complaint herein is set forth at pages 2 to 17 of the record.

## STATEMENT AS TO JURISDICTION AND STATEMENT OF THE CASE.

A statement of the grounds upon which jurisdiction of this Court is invoked is set forth in the petition (pp. 8-10), as is also a statement of the case (pp. 1-8, 10-13).

## SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified in the accompanying petition (ante, pp. 13-16) numbered 1 to 4, and including subsections (1) to (12), inclusive, the same being assigned as errors.

## SUMMARY OF ARGUMENT.

1. The Supreme Court of Illinois erred in sustaining a collateral attack upon and thus interfering retrospectively with administrative determinations made by the Interstate Commerce Commission and the Illinois Commerce Commission as public agencies in a joint hearing under authority of the Congress.

2. The Supreme Court of Illinois erred in asserting power to review and annul determinations and orders of the Interstate Commerce Commission.

3. The decision of the Supreme Court of Illinois is violative of principles applied and emphasized by the Court in *U. S.* v. *Chicago Heights Trucking Co.*, ..... U. S. ....., May 20, 1940, that the Interstate Commerce Commission and the Illinois Commission are expert bodies informed by experience and their acts are those of public agencies carrying out duties imposed by the Congress in the interest of shippers generally, the national transportation system and the public interest.

This case does not represent mere private litigation. It is one in which the public has a vital interest in order that, among other things, the rule of uniformity in charges be applied and creation of preferences and discriminations prevented.

4. The law does not permit the court to lay aside as without evidentiary force reports and orders of the Interstate Commerce Commission and of the Illinois Commerce Commission introduced of record.

5. Under similar circumstances the absence of state jurisdiction has been determined on the pleadings.

6. Respondents' cause is barred by the principle of administrative finality.

7. Respondents' petition for rehearing filed with the Illinois Commission raised no question as to the sufficiency of the evidence in respect of the Interstate Commerce Commission's report and order in the *Chicago Producers case.*

8. Upon this record, and on authority of *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, there is no legal theory supporting the judgment requiring petitioners to reduce retroactively rates approved by the Interstate Commerce Commission and the Illinois Commission in concurrent orders.

## ARGUMENT.

### I.

### THE SUPREME COURT OF ILLINOIS ERRED IN SUSTAINING A COLLATERAL ATTACK UPON AND THUS INTERFERING RETROSPECTIVELY WITH ADMINISTRATIVE DETERMINATIONS MADE BY THE INTERSTATE COMMERCE COMMISSION AND THE ILLINOIS COMMERCE COMMISSION AS PUBLIC AGENCIES IN A JOINT HEARING UNDER AUTHORITY OF THE CONGRESS.

The Supreme Court of Illinois erred fundamentally in refusing to give effect to the concurrent reports and orders entered by the Interstate Commerce Commission and the Illinois Commission under date of November 30, 1926.

The two Commissions not only were acting under specific authority of the Congress as set forth in section 13 (3) of the Interstate Commerce Act but also as public agencies carrying out duties imposed by the Congress in the interest of shippers generally, the national transportation system and the public interest. *U. S.* v. *Chicago Heights Trucking Co.*, ..... U. S. ....., May 20, 1940. Cf. *Inland Steel Co.* v. *U. S.*, 306 U. S. 153, 157.

In the *Chicago Heights case, supra*, this Court reversed the judgment of the special United States District Court which had set aside an order of the Interstate Commerce Commission finding certain proportional rate schedules published by motor vehicle operators unduly preferential and unjustly discriminatory, and therefore violative of section 216 (d) of the Motor Carrier Act, 1935 (49 U. S. C. 316 (d)). There the Commission had instituted an investigation upon its own motion and based its findings and order upon evidence which had been introduced of record by those supporting the suspended schedules, since no one appeared at

the hearing in opposition to them. The three judge court, in concluding to set aside the Commission's order, drew inferences from the evidence opposite to those of the Commission and disagreed with the findings. As pointed out by this Court, "The exercise of judgment by the Commission and by the court in appraising the same evidence" led to "opposing conclusions." This Court in sustaining the order of the Interstate Commerce Commission held that the three judge court had no authority to weigh the evidence and reach conclusions differing from that of the Commission. That case, it should be emphasized, was a direct review according to law of the Interstate Commerce Commission's order. Here the Supreme Court of Illinois has attempted a review collaterally and without authority of law.

Preliminary to development further of this point, petitioners invite the attention of the Court to the following language in the decision of this Court in *Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447, wherein a reparation order of the Illinois Commission was set aside by this Court on certiorari:

> "There is no suggestion that the intrastate rates in respect of which the Illinois commission awarded reparation were not made in obedience to and in strict accordance with the order of the Interstate Commerce Commission."

A similar situation is present in this record. There was no contention on the part of respondents before the Illinois Commission that the rates here involved were not in strict conformity with the report and order of the Interstate Commerce Commission in the *Chicago Producers case* as construed and applied in the *Chicago Gravel case.* This was indeed admitted in substance by respondents' principal witness, who asserted that the required relationship between

state and interstate rates could have been maintained by the petitioners by voluntarily reducing the interstate rates. (R. 46-47)

As was made clear in *Houston & Texas Ry* v. *United States*, 234 U. S. 342, better known as the *Shreveport case*, the Interstate Commerce Commission had power to fix relationship between state and interstate rates under the Interstate Commerce Act as it existed prior to its being amended and amplified in the Transportation Act of February 28, 1920.

Section 13 of the Interstate Commerce Act, as amended by the Transportation Act, accorded the Interstate Commerce Commission even wider power than it previously had, and this power has been sustained by this Court in a long line of cases, such as *Wisconsin R. R. Comm* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, *New York* v. *United States*, 257 U. S. 591, *Illinois Commerce Comm'n* v. *U. S.*, 292 U. S. 474.

To obtain the cooperation of state authorities in cases involving relationships of rates on state and interstate traffic, and to minimize as far as possible opportunities for conflict between state and interstate orders, the Interstate Commerce Act was amended by the Transportation Act by including section 13 (3), which provides:

> "Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission *may confer* with the authorities of any State having regulatory jurisdiction over the class of

persons and corporations subject to this part with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to *hold joint hearings* with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also *authorized to avail itself of the cooperation, services, records, and facilities of such State authorities* in the enforcement of any provisions of this part." (Emphasis supplied.)

It will be noted from the foregoing quotation that the statute expressly authorizes the Commission to hold conferences with authorities of any state, to hold joint hearings with state regulating bodies, and in general to avail itself of the cooperation, services, records, and facilities of the state authorities in the enforcement of the provisions of the act.

It will be noted also that the Congress likewise in section 13 (3) of the act authorized the Commission to prescribe rules in connection with the exercise of this power. These rules are embodied in an agreed statement of principles adopted by the Interstate Commerce Commission and the National Association of Railway and Utilities Commissioners, of which the Illinois Commission is a member, as set forth on pages 1832-1838 of Volume 3, Interstate Commerce Acts Annotated (Senate Document No. 166, 70th Congress). On page 1835 it is stated:

"Cooperation is but the working together for a common object or to a common end or result, which end or result is the best possible regulation of the railroads

and utilities mutually under the jurisdiction of the respective Federal and State commissions.

Public regulation of our railroads is performed in part by a commission representing the Federal Government and in part by commissions representing the various States. Conflicts of jurisdiction between the two systems of public regulation have arisen from time to time, resulting in litigation and action by the courts; but the Federal and State commissions were alike created in the public interest and have a common purpose, namely, the maintenance of a transportation system which will in all respects best meet the public needs. *In view of this common purpose they should, and we believe they can, work together for its attainment without conflict or resort to litigation. Such cooperation is contemplated by the interstate commerce act as interpreted by the Supreme Court, and is highly desirable in the public interest.*

The prime essential to such cooperation is realization of the nature and difficulties of the common problem. The State commissions realize that the railroads form a national transportation system and that the public interest demands a rate structure, State and interstate, as simple and harmonious as practicable. The Interstate Commerce Commission realizes that there is danger in overcentralization of authority, that the field of regulation is vast, and that the State commissions are often better informed than itself in regard to local conditions and local needs.

In one of its most important aspects, cooperation must look forward to and have in view the avoidance, so far as the public interest will permit, of orders under section 13 of the interstate commerce act, affecting intrastate rates.

Paragraph (3) of section 13 of the interstate commerce act authorizes the Interstate Commerce Commission to avail itself of the cooperation, services, records, and facilities of State commissions, to confer with them with respect to the relationship between rate

> structures and practices of carriers, and to hold joint hearings with them 'where the rate-making authority of a State is or may be affected by the action taken by the commission.' Our common purpose is to give the utmost force and effect to this provision of the law." (Emphasis supplied.)

This Court has held that the Interstate Commerce Commission has the power to construe and apply its findings and orders and to grant exceptions therefrom if found justified upon appropriate application. *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 591. *Georgia Comm.* v. *United States*, 283 U. S. 765, 772. *Florida* v. *United States*, 292 U. S. 1, 13. *Lambert Co.* v. *Balt. & Ohio R. R. Co.*, 258 U. S. 377, 381, hereinafter referred to as the *Lambert Run case*. *Arkansas Comm* v. *Chicago, R. I. & P. R. R. Co.*, 274 U. S. 597, 603. *Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447, 460. The general subject of the lack of power of state courts in the premises will be dealt with at length subsequently, but it should be noted at this point that state courts have no jurisdiction or power over rules or orders of the Interstate Commerce Commission. *Penn R. Co.* v. *Ills. Brick Co., supra. Lambert Run case, supra.* State courts are without power to construe an order of the Interstate Commerce Commission, since an order "may be as effectively annulled by misconstruction as by avowedly setting it aside." *American Express Co.* v. *Caldwell*, 244 U. S. 617, 628.

Petitioners' Exhibit 4 (R. 51, 92-134) is the report and order of the Interstate Commerce Commission of November 30, 1926, in the *Chicago Gravel case* issued in a joint hearing with the Illinois Commission involving sand and gravel rates in the territory covered, wherein the legal effect of their refusing to follow the suspension order of the Illinois Commission and their practice of collecting charges

in accordance with the order of the Interstate Commerce Commission was directly in issue. There the Interstate Commerce Commission (p. 639, R. 103-104) placed an authoritative and binding interpretation on its order in the *Chicago Producers case*. The same Commission also specifically rejected the contention of the complainants there, respondents here, that the finding and order in the *Chicago Producers case* did not apply to intrastate traffic from Zone I.

Under the Interstate Commerce Commission's interpretation of the order the local rate to Chicago from Zone I was 65 cents, which was the rate maintained for local shipment on the Chicago and North Western and the Milwaukee and the base rate to points beyond the rails of these respective railroads.

On page 640 of the report (R. 105) the Interstate Commerce Commission specifically found:

> "However, inasmuch as our order in the *Chicago Producers case* is still outstanding, the suspension order of the Illinois Commission did not become effective against the North Western and Milwaukee."

In two places (pp. 640 and 652; R. 105, 124) the Interstate Commerce Commission states that its order in the *Chicago Producers case* is still outstanding.

This specific finding of the Interstate Commerce Commission is waived aside by the Supreme Court of Illinois with the assertion herein (R. 233) that no issue was involved in the *Chicago Producers case* as to the legality or effect of the Illinois Commission's attempted suspension of the rate schedules.

Petitioners' Exhibit 6 (R. 51, 147-164), the concurrent order of the Illinois Commission dated November 30, 1926, in their Docket 15878, 15539, and 15191, the *Illinois Chicago*

*Gravel case,* the Illinois Commission's order entered on the record of the joint hearing held with the Interstate Commerce Commission in the *Chicago Gravel case,* shows that the Illinois Commission agreed with the interpretation of and the effect accorded the order in the *Chicago Producers case* by the Interstate Commerce Commission. This is clearly demonstrated by the Illinois Commission's order, wherein, after referring to conferences between the Illinois Commission, the Interstate Commerce Commission, and the Public Service Commission of Indiana, the Illinois Commission, on page 7 (Abst. 154-155), said:

> "The report and decision of the Interstate Commerce Commission which is issued concurrently with the order of this Commission and which was decided by both commissions on November 30, 1926, clearly sets forth the pertinent facts of record in this proceeding.
>
> The Interstate Commerce Commission, the Public Service Commission of Indiana, and the Illinois Commerce Commission have held several conferences in an endeavor to harmonize the interstate and intrastate rates. This, we believe, has been accomplished in such a way as to avoid the exaction of unjust, unreasonable or discriminatory rates."

The Illinois Commission further found that the charges collected were not unjust, unreasonable or unduly discriminatory. It denied the prayer for reparation (R. 156, 163), and fixed 65 cents as reasonable from Zone I, which was the exact measure of the base rate applied by petitioners during the period here involved. (R. 157) No effort was made on behalf of respondents to obtain a review of the Interstate Commerce Commission's order in the *Chicago Producers case* as construed and applied in the *Chicago Gravel case.* Cf. *Georgia Comm.* v. *United States,* 283 U. S. 765, at p. 772. Respondents, moreover, did not prosecute an appeal to Illinois courts from the Illinois Commission's

order issued concurrently with that of the Interstate Commerce Commission in the *Chicago Gravel case* under date of November 30, 1926. (Ex. 6; R. 52, 147-164) Respondents under date of September 21, 1928, filed a new complaint herein before the Illinois Commerce Commission reasserting the substance of the allegations of the complaint in the *Chicago Gravel case* in respect of the rate situation here presented. (R. 19-29)

It is manifest that the effect of the decision of the Supreme Court of Illinois is to sustain a collateral attack upon concurrent orders entered by the Interstate Commerce Commission and the Illinois Commerce Commission under authority of the Congress as contemplated by section 13 (3) of the Interstate Commerce Act. The direct result is to defeat the legislative policy and purpose of the Congress and to encourage and prolong litigation, this particular case dealing with transactions alleged to have occurred some fifteen years ago, and to grant by judicial fiat a preference in favor of respondents herein over and above all other parties to the joint proceeding before the Interstate Commerce Commission and the Illinois Commerce Commission in the *Chicago Gravel case.*

## II.

### THE SUPREME COURT OF ILLINOIS ERRED IN ASSERTING POWER TO REVIEW AND ANNUL DETERMINATIONS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

Examination of the order of the Illinois Commerce Commission entered under date of January 4, 1933, under review herein, shows that the Illinois Commission gave careful consideration to its jurisdiction and also to the jurisdiction accorded to the Interstate Commerce Commission over intrastate rates under provisions of the Interstate Commerce Act. (R. 2-17) The Illinois Commission found

(R. 14) that it had no power to review or set aside an order of the Interstate Commerce Commission, and that any contention that the order of the Interstate Commerce Commission in the *Chicago Producers case* was void should be addressed to the Interstate Commerce Commission or to the special United States District Court authorized by the United States statutes to entertain such questions.

The Supreme Court of Illinois, on the other hand, asserts the power and jurisdiction to review and annul orders of the Interstate Commerce Commission. This is evident from statements in the Court's opinion, in substance, that an order of the Interstate Commerce Commission will not be effective unless it conforms to a high standard of certainty; that it becomes necessary to determine whether the conditions exist upon which is dependent the right of the Interstate Commerce Commission to exercise its superior power, and that the orders contained findings having the legal effect attributed to them (R. 232-233). Moreover, the Supreme Court of Illinois held (R. 233) that no issue was involved in the *Chicago Gravel case* as to legality of rates charged or as to the effect of the attempted suspension by the Illinois Commission, and thus in effect annulled the following specific finding of the Interstate Commerce Commission:

> "However, inasmuch as our order in the *Chicago Producers case* is still outstanding, the suspension order of the Illinois Commission did not become effective against the North Western and Milwaukee." (R. 105, 124)

All these criteria made use of by the Illinois Supreme Court manifestly are elements of the power to review, set aside or annul,—a power under the law denied state courts.

That the finding of the Illinois Commission was right and the ruling of the Illinois Supreme Court was wrong,

is established by an unbroken line of decisions of this Court:

*North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485;
*Lambert Co.* v. *Balt. & Ohio R. R. Co.*, 258 U. S. 377;
*Venner* v. *Mich. Cent. R. R. Co.*, 271 U. S. 127;
*Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447;
*Atlantic Coast Line* v. *Florida*, 295 U. S. 301;
*Lancaster* v. *McCarty*, 267 U. S. 427;
*Texas* v. *Interstate Com. Comm.*, 258 U. S. 158;
*Southern Pac. Co.* v. *City of Willow Glen*, 49 Fed. (2d) 1005.

The legal principles adopted in the above cases likewise were recognized in Illinois until the decision of the Supreme Court of that state in the instant case. *The People* v. *Illinois Cent. R. R. Co.*, 324 Ill. 591; certiorari denied, 275 U. S. 541; *St. Louis Connect. R. R. Co.* v. *Blumberg*, 325 Ill. 387.

In the recent case of *Penn. R. Co.* v. *Ills. Brick Co., supra*, decided March 2, 1936, this Court held that an order of the Illinois Commission awarding reparation on shipments of brick from Bernice, Ill., to the Chicago switching district was void in so far as it related to a period when the intrastate rates were covered by an order of the Interstate Commerce Commission. For a long time the rate on brick from Bernice to the Chicago switching district and the rate within the switching district was 25 cents per ton. During the period of general rate changes during the war and thereafter there were marked changes in these rates and the relationship between the state and interstate rates became disrupted. Under date of January 11, 1921, the Interstate Commerce Commission entered an order re-

quiring the general level of intrastate rates in Illinois to be adjusted to the interstate level. These increased intrastate rates became effective February 19, 1921. On that date along with thousands of other intrastate rates the intrastate rate on brick from Bernice to the switching district was increased and the result was it became 98 cents and the rate between points within the district 42 cents. Under date of October 26, 1921, in a formal complaint case the Interstate Commerce Commission found that the interstate rate from Bernice was not unreasonable but it would be unduly prejudicial to the extent that it exceeded the rate on brick within the switching district by more than 10 cents per ton. The rate was required to be readjusted on or before February 16, 1922. In compliance with this order the carrier made effective on February 16, 1922, a rate of 50 cents per ton for intrastate and interstate transportation from Bernice into the switching district and between points within it.

Thereafter the Illinois Commission awarded reparation to the Illinois Brick Company on intrastate traffic for a period including the period February 19, 1921, the effective date of the Interstate Commerce Commission's order dealing with intrastate rates, to February 16, 1922, when the rate became 50 cents as the result of the order of the Interstate Commerce Commission.

This Court in holding that the Illinois Commission had no power to award reparation subsequent to February 19, 1921, said (p. 459), "To the extent, if at all, that there is conflict between state and federal regulation, the latter must prevail." The Court pointed out that during that period the intrastate rates from Bernice to the switching district were maintained by the railroad pursuant to and in accordance with the Interstate Commerce Commission's order of January 11, 1921, and that its direction to the car-

riers to collect charges based on the intrastate rates required by the order was *mandatory,* and further, that in order that the prescribed equality between intrastate and corresponding interstate rates should not be disturbed by state authority or by action of the carriers, "the commission declared that the order—and necessarily the rates directed—should continue in force until changed by it." The Court made clear that the order of January 11, 1921, established a rule of equality between rates for interstate and intrastate transportation and the railroad was required to maintain this equality, and that there was nothing in the report and order of October, 1921, which resulted in the reduction of the rate to 50 cents effective February 16, 1922, to indicate an intention on the part of the Commission to authorize or permit a change "of the one without a like change in the other." The Court said (p. 461):

> "The purpose, by exertion of federal authority to control both, persisted. The state commission was not, at any time after the intrastate rates were established under federal authority, authorized to condemn them or to award reparation in respect of transportation to which they applied."

With respect to the binding force of rates resulting from a relationship ordered by the Interstate Commerce Commission the court (p. 460) said:

> *"Save as the rate so prescribed might be dealt with under federal law, the carriers were bound to collect the charges based upon them. By the Interstate Commerce Act and that order, the State was divested of jurisdiction, by specific order, award of reparation or otherwise, to reduce the charges based on the intrastate rates so established. The order of the Illinois commission, in so far as it awards reparation in respect of transportation covered by rates that petitioner was required to put in force and maintain by the Interstate Commerce Commission's order of January 11,*

*1921, is plainly repugnant to the Interstate Commerce Act and to that order."* (Emphasis supplied.)

It will be noted that in the case just analyzed an attempt of the Illinois Commission to award reparation was held by this Court to be unlawful and beyond its powers. The case demonstrates most clearly and beyond all question that the order of the Illinois Commission herein denying reparation to respondents is correctly grounded in the law, and, indeed, the only order that lawfully could be entered.

In *North Dakota* v. *Chicago & N. W. Ry. Co., supra,* the State of North Dakota filed in the Supreme Court of the United States a bill in equity against certain named railroads to prevent their putting into effect an order of the Interstate Commerce Commission increasing intrastate rates within North Dakota. The court held that the suit was one to set aside or suspend an order of the Interstate Commerce Commission, and therefore by section 211 of the Judicial Code the United States must be a party, and that the United States has consented to be sued only in the district court of the United States where such suits are required to be brought (Judicial Code, Sec. 208; Act of Oct. 22, 1913, chap. 32, 38 Stats. 219).

The *Lambert Run case* is a leading case to which reference was made on page 639 of the Interstate Commerce Commission's report in the *Chicago Gravel case* (Ex. 4; R. 51, 103). In the *Lambert Run case* a coal operator brought a suit in one of the state courts of West Virginia praying that the defendant railroad be restrained from observing its rules with regard to car distribution. The cause was removed to the Federal court for the Northern District of West Virginia. In its answer the railroad, among other things, alleged that the rules against which the suit was

directed had been promulgated by the Interstate Commerce Commission. The District Court granted an interlocutory injunction, which was reversed on appeal by the Circuit Court of Appeals. The Court held that since the suit essentially was one to set aside or annul an order of the Interstate Commerce Commission the state court never had jurisdiction and the United States District Court acquired none by removal, since the only court having jurisdiction was the special United States district court consisting of three judges. This Court (pp. 381, 382) said:

> "The rule of the railroad here complained of was that prescribed by the Commission. *To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction.* By this suit such a decree was in effect sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges.
>
> But there are in addition two fundamental objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. Judicial Code, Sec. 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 208, 219. * * * The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal." (Emphasis supplied.)

The particular attention of the Court is invited to the principle stated in the above quotation that a railroad must conform to an order of the Interstate Commerce Commission unless relieved by that Commission itself or enjoined by a decree of the court having jurisdiction, which court can only be a special United States district court of three judges.

*Venner* v. *Mich. Cent. R. R. Co., supra,* likewise was cited by the Interstate Commerce Commission in the *Chicago Gravel case.* There this Court affirmed a decree of the district court dismissing an injunction suit for want of jurisdiction. As in the *Lambert Run case,* the suit was begun in a state court and then removed to the United States district court. The suit was brought by a minority stockholder of a railroad to enjoin it from carrying out an agreement and arrangement with respect to the purchase of locomotives, which arrangement had been authorized by the Interstate Commerce Commission. The bill alleged, among other things, that the proposed arrangements would be in violation of the laws of the state in the absence of approval by state authorities, and that such approval had not been obtained. This Court held that the state court was without jurisdiction and the district court acquired none by removal. This Court (pp. 130-131) said:

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377, 380, 382. Such a suit must be brought against the United States as the representative

> of the public and may be brought only in a federal district court. Judicial Code, sec. 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 219; * * * That the order is not mandatory but permissive makes no difference in this regard. * * * And as the state court was without jurisdiction the federal court acquired none by the removal."

The *Houston & Texas case,* more commonly known as the *Shreveport case,* is one of the landmarks of railroad rate regulation. In it this Court sustained against direct attack in the then Commerce Court of the United States an order of the Interstate Commerce Commission which had the effect of authorizing an increase of certain intrastate rates. The Supreme Court (p. 360) said:

> "Reading the order in the light of the report of the Commission, it does not appear that the Commission attempted to require the carriers to reduce their interstate rates out of Shreveport below what was found to be a reasonable charge for that service. So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination. *But this result they are required to accomplish."* (Emphasis supplied.)

It will be noted that the railroads were bound to establish the relationship fixed by the Interstate Commerce Commission's order, but they had the choice of increasing the intrastate rates instead of reducing the interstate rates. With respect to maintaining the required rate relationship the order was *mandatory.*

Concerning the paramount effect to be accorded the standard of rates fixed by the Interstate Commerce Commission, the agency of Congress, attention is invited to what the Supreme Court has said at page 355 of the *Shreveport case*:

> "It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes."

*Lancaster* v. *McCarty, supra,* is a case making clear what might be referred to as the indirect but nevertheless decisive effect of an order of the Interstate Commerce Commission. The case was a suit for damages brought in one of the County Courts of the state of Texas to recover from the Receivers of the Texas & Pacific Railway damages for injury to certain furniture shipped over the railway. The issue before the Court was whether damages for the admitted injury should be measured by the statutory law of Texas or by regulations of the Interstate Commerce Commission with respect to the classification of traffic and fixing of rates as directed by it in accordance with the proceedings affirmed by this Court in the *Shreveport case.*

The shipment moved intrastate in Texas, *i. e.,* from Fort Worth, Texas, to Cisco, Texas. Judgment for the shipper and against the railroad was sustained by the Texas Court of Civil Appeals. This Court reversed the Court of Civil Appeals and held that the regulations of the Interstate Commerce Commission superseded the statute of Texas. The Court said (p. 431):

> "This Western Classification, which the carrier applied in this case, was adopted by the railroads under

the authority of the Interstate Commerce Commission thus sustained in the *Shreveport Case.* That authority rested on the supremacy of federal authority in respect to interstate commerce. The intrastate rates fixed by the Texas State Railway Commission from Houston and Dallas eastward to Texas points were a discrimination against the interstate traffic between Shreveport and those same points; and, therefore, it was held to be within the power of the Interstate Commerce Commission, in preventing such unlawful discrimination under the Interstate Commerce Act, *to direct the railways to ignore the Texas Commission rates and to establish rates, not unduly discriminating against interstate commerce, in intrastate traffic. Such an order of course, included classification as well as rates. The two are so bound together in the regulation of interstate commerce that the effect of both must be reasonable and without undue discrimination.* The Interstate Commerce Commission, therefore, had full authority to issue this order for the adoption of the Western Classification for intrastate points between Houston and Cisco, both in Texas. The conflict between the revised Statutes of Texas and the order of the Interstate Commerce Commission can only be settled by recognition of the supremacy of the federal authority." (Emphasis supplied.)

The Illinois Commission gave effect to the order of the Interstate Commerce Commission as required by its plain words and the construction placed upon it by the Interstate Commerce Commission in the *Chicago Gravel case* and by the Illinois Commission in its report issued in the joint hearing in that case. This was in accordance with law, since neither state commissions nor state courts have the power of jurisdiction to set aside an order of the Interstate Commerce Commission, either directly or indirectly, by a process of interpretation. It was distinctly so held in *American Express Co.* v. *Caldwell,* 244 U. S. 617, 628, where

this Court, in denying state jurisdiction in respect of such matters, said, "An order may be as effectively annulled by misconstruction as by avowedly setting it aside."

By way of emphasis defendants invite the attention of the Court again to *Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447, wherein at page 460 this Court stated in positive terms that when an intrastate rate is prescribed by order of the Interstate Commerce Commission, "Save as the rate so prescribed might be dealt with under federal law, the carriers were bound to collect the charges based upon them."

The binding effect of orders of the Interstate Commerce Commission is clearly explained and established in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301. There this Court reversed the decree of the District Court of Florida awarding restitution to certain shippers for freight charges which had been collected under authority of an order of the Interstate Commerce Commission, which later had been declared void by this Court in a direct action brought in a special United States district court in accordance with United States statutes. The district court had sustained the Interstate Commerce Commission's order. This Court later reversed the district court and set aside the Commission's order on the ground that the order was void because the findings of the Commission were incomplete and inadequate. In the meantime, however, the railroad, under authority of the order of the Interstate Commerce Commission, had charged rates which were higher than those which had theretofore been in effect by state authority.

After referring to the fact that the order had been held void by this Court because of insufficient findings, the court (p. 311) said:

> "The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court. It would have exposed

itself to suits and penalties, both criminal and civil, if it had followed such a path. See, *e. g.*, Interstate Commerce Act, 49 U. S. C., Sec. 16 (8) (9) (10) (11). *Obedience was owing while the order was in force.*" (Emphasis supplied.)

*Atlantic Coast Line* v. *Florida, supra,* was cited with approval by this Court in *United States* v. *Morgan,* 307 U. S. 183.

From the foregoing authorities it is manifest that there is no legal obligation to comply with state statutes or tariff rules and regulations as a condition prerequisite to charging rates authorized by an order of the Interstate Commerce Commission. In *American Express Co.* v. *Caldwell,* 244 U. S. 628, this Court distinctly so held. The court observed that a valid order of the Interstate Commerce Commission is a legal justification for disregarding a conflicting regulation of the state law because the federal authority is dominant. In this case, as has been pointed out above, the Interstate Commerce Commission's order was held applicable by that commission itself, and the Illinois Commission concurred in that interpretation of the order. The Interest Commerce Commission's order was valid, but whether valid or invalid cannot be made a subject of inquiry in this proceeding.

It clearly appears, therefore, that in any view of the situation the order of the Interstate Commerce Commission was binding upon the railroads and the Illinois Commission was right in finding that it had no power to set aside the order retroactively by an award of reparation. It is equally clear also that state courts likewise are without such power and the order of the Illinois Commission should be sustained.

## III.

**THE DECISION OF THE SUPREME COURT OF ILLINOIS IS VIOLATIVE OF PRINCIPLES APPLIED AND EMPHASIZED BY THE COURT IN U. S. v. CHICAGO HEIGHTS TRUCKING CO., — U. S. —, May 20, 1940, THAT THE INTERSTATE COMMERCE COMMISSION AND THE ILLINOIS COMMISSION ARE EXPERT BODIES INFORMED BY EXPERIENCE AND THEIR ACTS ARE THOSE OF PUBLIC AGENCIES CARRYING OUT DUTIES IMPOSED BY THE CONGRESS IN THE INTEREST OF SHIPPERS GENERALLY, THE NATIONAL TRANSPORTATION SYSTEM AND THE PUBLIC INTEREST.**

**THIS CASE DOES NOT REPRESENT MERE PRIVATE LITIGATION. IT IS ONE IN WHICH THE PUBLIC HAS A VITAL INTEREST IN ORDER THAT, AMONG OTHER THINGS, THE RULE OF UNIFORMITY IN CHARGES BE APPLIED AND CREATION OF PREFERENCES AND DISCRIMINATIONS PREVENTED.**

The decision of the Supreme Court of Illinois gives no effect to the principle that both the Interstate Commerce Commission and the Illinois Commission in law are regarded as expert and informed administrative bodies,* and in holding the joint hearing under section 13 (3) of the Interstate Commerce Act and in entering their concurrent orders of November 30, 1926, acted as public agencies. *U. S. v. Chicago Heights Trucking Co., supra.*

The rule is, as stated in the *Lambert Run case,* among other authorities, that in suits involving orders of the Interstate Commerce Commission the United States as the representative of the public is an indispensable party and it can be sued only in a special United States District

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* This rule has long been recognized and followed. Other authorities recognizing and applying this rule are: *Rochester Tel. Corp.* v. *U. S.* 307 U. S. 125. *Standard Oil Co.* v. *United States,* 283 U. S. 235. *Humphrey's Executor* v. *U. S.,* 295 U. S. 602. *Ill. Cent. R. R.* v. *Inter. Com. Comm.,* 206 U. S. 441. *Miss. Valley Barge Co.* v. *U. S.,* 292 U. S. 282, 286. *Palmyra Co.* v. *Modesto Co.,* 336 Ill. 158, 165. *Commerce Com.* v. *C. C. C. & St. L. Ry. Co.,* 309 Ill. 165, 170. *S. Chicago Coal Co.* v. *Commerce Com.,* 365 Ill. 218.

Court. The underlying reason for this statutory rule is that as a matter of public policy a carrier cannot be permitted to be in a position to give preferences by means of consent judgments or waiver of available defenses. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667. By the United States being an indispensable party, it is made possible for such suits to be defended by the representatives of the public at large instead of being left to railroads who are subject to the pressure of interested shippers.

From the foregoing principle it follows that when petitioners were confronted with a repetitious complaint filed by the same parties, respondents herein, they were justified in introducing of record and relying upon the reports and orders of the Interstate Commerce Commission and the Illinois Commission concurrently entered under date of November 30, 1926, in which the order of the Interstate Commerce Commission in the *Chicago Producers case* was construed and applied and all issues involved herein determined adversely to respondents.

Since the concurrent orders of the two Commissions of November 30, 1926, were entered by the two Commissions upon a record made at a joint hearing authorized by section 13 (3) of the Interstate Commerce Act, it would manifestly have been a gross impropriety for petitioners to be parties to an attempted retrial of the same issues on a subsequent record not made in the presence of the Interstate Commerce Commission. And petitioners respectfully submit that there is no principle of law which authorizes state courts to compel a retrial of such questions in the absence of the Interstate Commerce Commission.

The concurrent reports and orders of the Interstate Commerce Commission (Ex. 4; R. 51, 93-134) and of the Illinois Commerce Commission (Ex. 6; R. 52, 147-164) in the proceeding contemplated by section 13 (3) of the Interstate

Commerce Act, must be accepted as a complete answer to the complaint herein. If it were possible under the law to keep retrying cases of this kind, it is clear that the way would be open for carriers to single out favored shippers by making an incomplete presentation of evidence in a given case.

The public concern in a situation of the kind here presented, as evidenced by statutes of the Congress, is clearly expressed in the following from page 383 of the decision of the Supreme Court in the *Lambert Run case*:

> "And the vital interest of the United States was one which the plaintiff could neither ignore nor prejudice by indirection."

In the same connection, this Court at page 490 of the decision in *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485, said:

> "The language of the section shows that public interests were before the mind of Congress, and that in its opinion an order made in the public interest should not be hindered from going into effect until the representative of the public had been heard."

The Court is respectfully reminded that this record shows that the judgment of the Supreme Court of Illinois would operate to prefer respondents by reducing retroactively the Zone I rate *only on their* alleged shipments from 65 cents to 60 cents. The rate from Zone I on traffic of *all other* intrastate shipments from points on the Chicago and North Western and the Milwaukee would remain at 65 cents, and the rate from Zone II for all intrastate shippers would remain at 70 cents, the same as the contemporaneous interstate rate (R. 123-124, 157-158), *all of which the concurrent orders entered on November 30, 1926, by the Interstate Commerce Commission and the Illinois Commission, acting*

*as public agencies in the interest of shippers generally, prohibited.*

## IV.

### THE LAW DOES NOT PERMIT THE COURT TO LAY ASIDE AS WITHOUT EVIDENTIARY FORCE REPORTS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND OF THE ILLINOIS COMMERCE COMMISSION INTRODUCED OF RECORD.

In the opinion of the Illinois Supreme Court herein it is stated (R. 232-233):

> "In short, to establish their defense to the complaint, it was incumbent upon the defendants to prove the fact that an order had been entered in the *Chicago Producers case* on September 23, 1921, which contained findings having the legal effect attributed to them. The only authoritative evidence of this requisite fact was the decision and order of the Interstate Commerce Commission itself."

The foregoing quotation suggests several misapprehensions on the part of the Illinois Supreme Court as to what must be regarded as evidence of record and as to the powers of state courts, viz.: (1) That state courts have power to review and pass upon the adequacy of findings of fact in orders of the Interstate Commerce Commission, a repetition of the error pointed out above; (2) that to defend a repetitious complaint defendants are required to retry a previous proceeding determined adversely to complainants; (3) that the report and order of the Interstate Commerce Commission in the previous case, even when as here introduced of record, is not entitled to be treated as evidence; and (4) that litigation of this kind is merely private in character and not clothed with a public interest.

The report and order introduced of record was entered by the Interstate Commerce Commission in a hearing held

under specific authority of section 13 (3) of the Interstate Commerce Act, in which hearing the subject matter herein was investigated by the Interstate Commerce Commission and by the Illinois Commission and, under date of November 30, 1926, contemporaneous reports and orders entered. There the Interstate Commerce Commission (Ex. 4; R. 51, 103-105, 124), with the concurrence of the Illinois Commerce Commission (Ex. 6; R. 147-164), construed and applied its report and order in the *Chicago Producers case.* It is well established that there are only two bodies that have jurisdiction in the first instance to construe or set aside an order of the Interstate Commerce Commission, viz., the Commission itself or the specially constituted United States District Court. See, among other cases, the *Lambert Run case,* p. 381, and cases cited above under points I and II. In the case in hand, upon petition of respondents herein, the Interstate Commerce Commission reexamined and confirmed its previous action and its report and order is in evidence herein (Ex 4; R. 51, 93-134). There is no principle of law which permits a state court to waive aside the Interstate Commerce Commission's report and order as wholly without evidentiary value, particularly where, as here, it was based on a proceeding authorized by the Congress in section 13 (3) of the Interstate Commerce Act.

The Supreme Court of Illinois likewise was in error in giving no consideration to the order of the Illinois Commerce Commission in its Docket 10666 (Ex. 7; R. 52, 165-195). Petitioners respectfully invite the attention of the Court to the fact that inspection of that order (R. 52, 165-195) shows that by agreement of all parties the record made before the Interstate Commerce Commission in the *Chicago Producers case* was made a part of the record in the proceeding known as Illinois Commission Docket No. 10666, and the Illinois Commission dealt with the rate re-

lationship prescribed in that proceeding and reaffirmed by the Interstate Commerce Commission in *Chicago Gravel case.* (Ex. 4; R. 51) As already suggested, there is no principle of law that requires an administrative body continually to keep retrying matters of this kind.

The Illinois Supreme Court's complete blackout of the documentary evidence introduced by petitioners is unsupported by precedent, either state or Federal. In *A. T. & S. F. Ry. Co.* v. *Commerce Com.*, 335 Ill. 624, at page 645 the decision of that Court indicates positively that reports and orders which are introduced physically into the record or evidence of the contents thereof introduced of record must be considered.

The subject of practice and evidence before administrative bodies recently has been given attention by this Court. *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125. *Federal C. C.* v. *Pottsville Broadcasting Co.*, ..... U. S. ....., 84 L. Ed. 361. *Nat'l Labor Rel. Bd.* v. *Waterman Steamship Corp'n*, ..... U. S. ....., 84 L. Ed. 448. In the *Rochester Telephone case,* at page 125, the Court said:

> "Recognition of the Commission's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards."

Again, in the *Pottsville Broadcasting case* this Court said:

> "These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review, which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, 'should not be too narrowly constrained by technical rules as to the admis-

> sibility of proof,' *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, 48 L. Ed. 860, 869, 24 S. Ct. 563, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multudinous duties."

That case was cited recently by this Court in *Perkins* v. *Lukens Steel Co.*, ..... U. S. ....., 84 L. Ed. 743, where judicial interference with administrative determinations was disapproved.

In the *Waterman Steamship case* this Court in a unanimous decision held that courts are not empowered to review or interfere with determinations of administrative bodies on questions of fact.

The same principle is included in Illinois statutory law, Section 64, Chapter 111-2/3, Illinois Revised Statutes, 1939, providing:

> "In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or an officer of the Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission."

The rules of procedure and evidence insisted upon by the Supreme Court of Illinois herein are decidedly technical and represent departures from the principles announced in the Illinois statute just cited and in decisions of this Court relating to administrative agencies and their methods of inquiry necessarily made use of by them in discharging their large and complex duties and responsibilities entrusted to them by law. Their responsibilities cannot be discharged with dispatch and with uniformity, particularly

those under section 13 (3) of the Interstate Commerce Act, if determinations and orders once made are not considered evidence in future proceedings and dissatisfied litigants are permitted, by the simple device of filing a new and repetitious complaint, to obtain collaterally a review of proceedings to which they were parties.

Petitioners respectfully submit that the order of the Illinois Commerce Commission of January 4, 1933, dismissing the complaint herein is amply supported by wholly undisputed evidence which the courts of Illinois have no right to disregard. *U. S.* v. *Chicago Heights Trucking Co.*, ..... U. S. ....., May 20, 1940.

## V.

### UNDER SIMILAR CIRCUMSTANCES THE ABSENCE OF STATE JURISDICTION HAS BEEN DETERMINED ON THE PLEADINGS.

The opinion of the Supreme Court of Illinois herein, after according recognition to the fact (R. 235) that the proceedings before the Interstate Commerce Commission including the joint proceedings with the Illinois Commission under authority of Section 13 (3) of the Interstate Commerce Act, were disclosed in petitioners' amended answer and motion to dismiss*, observes that this is in effect an argument that a finding prerequisite to the validity of the order of the Commission may be supplied by implication. The opinion then asserts that an express finding was indispensable. This amounts to a repetition of the previous error of the court heretofore pointed out, *i. e.*, the assumption that state courts have the power and jurisdiction to

* Respondents' reply under date of November 21, 1928, included no denial that the Interstate Commerce Commission's order in the *Chicago Producers case* was issued and was continuing in character. The reply in its nature was one of confession and avoidance, in that it asserted that the order was silent in regard to Illinois inner zone rates and the order was void.

review orders of the Interstate Commerce Commission and to pass upon the adequacy of the findings contained in such orders. *Wichita R. R.* v. *Public Util. Comm.*, 260 U. S. 48, cited in the opinion does not sustain what appears to be the Illinois Supreme Court's view as to the law. No action of the Interstate Commerce Commission was involved in that case, and it lends no support to the doctrine asserted by the Supreme Court of Illinois that state courts have the power to review findings and orders of the Interstate Commerce Commission.

In this connection the Court's attention is respectfully invited to the *Lambert Run case and Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447. In each of these cases the state courts or commission was found without jurisdiction in the premises and the *decision was based upon the pleadings.* In the *Illinois Brick case* this Court set aside a reparation order of the Illinois Commerce Commission amounting to $44,428.09, and, as shown by the opinion, the decision was based upon "a question *raised by the answer* and decided by the Appellate Court, the highest court of the state in which a decision could be had."

This Court's attention is invited to the fact that in each of the cases just cited the decision turned on the fact that there was an outstanding order of the Interstate Commerce Commission controlling the situation involved. Whether the order of that Commission was adequately supported by evidence and findings of fact, apparently was not considered a question which could be presented, and it was not discussed by this Court in either of the opinions, indeed, it was not even noted.

Uncontroverted allegations of the pleadings were accorded weight by this Court as a basis for deciding *Stoll* v. *Gottlieb*, 305 U. S. 165, 168.

The opinion of the Supreme Court of Illinois herein states that the jurisdiction of the Illinois Commission cannot be defeated, either by assertions of the petitioners or by the failure of respondents to deny assertions in the pleadings. This statement overlooks the controlling legal principle that the paramount jurisdiction and authority of the Interstate Commerce Commission cannot be defeated nor its orders set aside by indirection. In the *Lambert Run case* this Court specifically held that jurisdiction to set aside an order of the Interstate Commerce Commission cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist.

## VI.

### RESPONDENTS' CAUSE IS BARRED BY THE PRINCIPLE OF ADMINISTRATIVE FINALITY.

In *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, this Court at pages 139-140, with respect to the doctrine of administrative finality, said:

> "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

In connection with the foregoing quotation petitioners invite the attention of the Court to the fact that this Court was there referring to proceedings in which an order of an administrative body is under direct review in the manner provided by statute. In the case in hand neither the order of the Interstate Commerce Commission of November 30, 1926 (Ex. 4; R. 51, 93-134) nor the order of the

Illinois Commerce Commission of the same date (Ex. 6; R. 52, 147-164) is or can be reviewed in this proceeding. They must be accepted as written and cannot be set aside collaterally.

The foregoing principle is written in the Illinois statutes, Section 72, Chapter 111-2/3, Illinois Revised Statutes, 1939, providing that when no appeal is taken from an order or decision of the Commission the parties affected by such order or decision shall be deemed to have waived the right to have the merits of the controversy reviewed by a court. Until the decision in the instant case the Supreme Court of Illinois has applied that principle so as to prevent a collateral attack on orders of the Illinois Commission. *C. N. S. & M. R. R. Co.* v. *City of Chicago,* 331 Ill. 360. *Hoyne* v. *Chi. & Oak Park El. R. R. Co.,* 294 Ill. 413. In this case, however, the Supreme Court of Illinois erroneously sustains a collateral attack on the Illinois Commission's concurrent order of November 30, 1926.

Respondents herein admittedly (R. 50-51) were parties to the joint proceeding before the Interstate Commerce Commission and the Illinois Commission which culminated in the concurrent orders of November 30, 1926. Six of the respondents (R. 165-173) were parties to the proceeding which resulted in the Illinois Commission's report and order in the *Illinois Chicago Producers case.* (Ex. 7; R. 52, 155, 173.)

What has been said above in respect of identity of parties is to be considered as informative rather than suggesting that in a situation of this kind identity of parties is necessary. In legal contemplation the result would be the same even though none of respondents herein had been parties to the proceeding described. The rule is as laid down by the Circuit Court of Appeals, Second Circuit, in *Aron* v. *Pennsylvania R. Co.,* 80 Fed. (2d) 100; certiorari

denied 298 U. S. 658, that a determination between a railroad and one shipper is final and binding in a case involving the same issues, even with a different shipper.

The same principle was announced by this Court in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, wherein it was held that a finding and order of the Interstate Commerce Commission inured to all shippers concerned with the same rates even though not parties to the proceeding. The basis of this principle is that litigation of this kind is not private in character but a matter of public concern in which the whole body of shippers is interested. To relate the effect of such a proceeding only to the parties thereto would result in discriminations and a lack of uniformity between shippers.

Under this doctrine, therefore, all shippers similarly situated are bound by the reports and orders of the Interstate Commerce Commission and the Illinois Commission in the *Chicago Gravel cases* and by the report and order of the Illinois Commission in the *Illinois Chicago Producers case.*

Attention is invited to *Stoll* v. *Gottlieb,* 305 U. S. 165, wherein this Court on certiorari reversed the judgment of the Supreme Court of Illinois in 368 Ill. 88. There the United States District Court in a proceeding to reorganize a corporation under section 77B of the Bankruptcy Act approved a plan providing, among other things, for the discharge of certain bonds and cancellation of a personal guaranty. A party who had appeared in the proceedings before the United States District Court later in the state court obtained judgment on the guaranty. No appeal had been taken from the orders of the United States District Court. This Court held that the proceedings in the United States District Court were *res judicata,* saying (p. 172):

> "Courts to determine the rights of parties are an integral part of our system of government. It is just

> as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

Although *Stoll* v. *Gottlieb* relates to the strict legal doctrine of *res judicata,* it has particular application here and supports the view that all questions here involved were finally determined by the two administrative tribunals, the Interstate Commerce Commission and the Illinois Commerce Commission, and are not subject to review by the courts. See also *Union Joint Stock Land Bank* v. *Byerly,* — U. S. —, 84 L. Ed. 689.

Application of this principle is particularly of consequence in this case because the alleged subject matter took place nearly fifteen years ago and petitioners in the meantime have come under the jurisdiction of the United States District Court, Northern District of Illinois, Eastern Division, for reorganization under the Bankruptcy Act, as amended. *Chicago & N. W. Ry. Co. Reorganization,* 230 I. C. C. 548.

## VII.

### RESPONDENTS' PETITION FOR REHEARING FILED WITH THE ILLINOIS COMMISSION RAISED NO QUESTION AS TO THE SUFFICIENCY OF THE EVIDENCE IN RESPECT OF THE INTERSTATE COMMERCE COMMISSION'S REPORT AND ORDER IN THE CHICAGO PRODUCERS CASE.

On February 1, 1933, respondents filed with the Illinois Commission a petition for rehearing. (R. 87-90.) In respect of the Interstate Commerce Commission's report and order in the *Chicago Producers case* this petition states that it is " * * * the contention of these complainants

that the order of the Interstate Commerce Commission in Docket 11490, September 23, 1921, 64 I. C. C. 37, upon which defendants rely, was illegal and void because no findings of undue prejudice to interstate commerce were made by the federal Commission."

Petitioners joined issue with respondents by filing under date of February 9, 1933, an answer to respondents' petition for rehearing in which it was alleged that the Illinois Commission had no jurisdiction or power to sit in judgment on orders of the Interstate Commerce Commission. (R. 91)

The Illinois Commission denied respondents' petition by order entered under date of February 15, 1933. (R. 91)

Section 71, Chapter 111-2/3, Illinois Revised Statutes, 1939, provides that an application for rehearing, together with action thereon by the Illinois Commission, is a jurisdictional prerequisite to an appeal from any order or decision of the Commission.

The law is well established that no point can be raised in court as a ground for setting aside an order of an administrative body unless it has first been presented to that body. *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380. *Chicago, etc. R. R.* v. *Risty,* 276 U. S. 567. *Petersen Baking Co.* v. *Bryan,* 290 U. S. 570. *City of Elmhurst* v. *Western Gas Co.,* 363 Ill. 144.

## VIII.

**UPON THIS RECORD AND ON AUTHORITY OF ATLANTIC COAST LINE v. FLORIDA, 295 U. S. 301, THERE IS NO LEGAL THEORY SUPPORTING THE JUDGMENT REQUIRING PETITIONERS TO REDUCE RETROACTIVELY RATES APPROVED BY THE INTERSTATE COMMERCE COMMISSION AND THE ILLINOIS COMMISSION IN CONCURRENT ORDERS.**

Respondents do not contend that the rates involved herein were unreasonable. Upon this admission the rates, there-

fore, must conclusively be regarded as reasonable for transportation service furnished.

There is no issue or evidence of record to support the judgment of the Supreme Court of Illinois directing the Illinois Commission to award restitution.

In view of this state of the record, there is no legal theory upon which respondents could prevail. Petitioners in connection with the preceding point herein anaylzed *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, wherein this Court held that shippers were not entitled to restitution for rates charged under authority of an order of the Interstate Commerce Commission which was found void as the result of a direct attack in the manner provided by the United States statutes. *Atlantic Coast Line* v. *Florida* was cited with approval in *United States* v. *Morgan*, 307 U. S. 183.

In *Atlantic Coast Line* v. *Florida* this Court held that in order to recover it was incumbent upon the shippers to show that the rates fixed by the Commission in the void order were *unreasonable*. Applying this principle, it is apparent that under no circumstances can respondents recover anything by way of reparation, because it is conclusively admitted that they were charged reasonable rates.

To the same effect also is *Aron* v. *Pennsylvania R. Co.*, 80 Fed. (2d) 100. Certiorari denied 298 U. S. 658, wherein the United States Circuit Court of Appeals, Second Circuit, affirmed the judgment of the lower court dismissing a suit brought by certain shippers against a railroad to recover certain charges paid for servicing livestock at stockyards. The suit was based on the theory that the charges were illegally collected, being a transportation charge not included in the railroad's published tariff, in violation of section 6 of the Interstate Commerce Act. The court held that shippers were *not* entitled to recover the amount of

the charge but only what was in excess of a reasonable charge for the service performed, and as there was no determination of the reasonableness of the charge there could be no recovery.

Upon the principle of the *Aron case* there could be no recovery here, since on this record the charges collected are admitted to have been reasonable.

Further support for this view is found in *Great Northern Ry.* v. *Sullivan*, 294 U. S. 458, wherein this Court set aside an order of the Interstate Commerce Commission awarding reparation in connection with shipments from points in Canada to destinations in the United States. There was no contention that the through rates were unreasonable and the Court observed that such rates "must be deemed to have been just and reasonable." The Commission had found unreasonable the rates applying to transportation within the United States and awarded reparation. The Court held that the shipper's only interest is that the charge should be reasonable as a whole.

Under this doctrine it is apparent, therefore, that respondents were not and could not have been damaged by collection of rates in harmony with the order of the Interstate Commerce Commission, since, as stated by the Supreme Court on this record, the rates charged "must be deemed to have been just and reasonable." And, indeed, as already made clear, the local rate of the railroads, viz., 65 cents, which also was the base rate to deliveries involving more than one line of railroad, was found to be reasonable and nondiscriminatory by the Illinois Commission.

## CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the manifold errors of the Supreme

Court of Illinois in its decision herein, which is in conflict with the law as construed in applicable decisions of this Court and which, if it is permitted to stand as a precedent, will tend directly to obstruct and defeat the legislative policy of the Congress in exercising its constitutional powers, may be corrected and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Illinois and finally reverse it.

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## APPENDIX.

### RELEVANT PARTS OF CERTAIN STATUTES.

**Interstate Commerce Act, Sec. 3 (1) (49 U.S.C. Sec 3):**

"(1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

**Interstate Commerce Act, Sec. 13 (3) and (4) (49 U.S.C. Sec. 13):**

"(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any mat-

ters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part."

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

**Excerpts from Chapter 111-2/3, Illinois Revised Statutes, 1939:**

"Section 36. * * * Whenever there shall be filed with the commission any schedule stating an individual or joint rate or other charge, classification, contract, practice, rule or regulation, the commission shall have power, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders. without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation, and pending the hearing and the decision

thereon, such rate or other charge, classification, contract, practice, rule or regulation shall not go into effect. The period of suspension of such rate or other charge, classification, contract, practice, rule or regulation shall not extend more than one hundred and twenty days beyond the time when such rate or other charge, classification, contract, practice, rule or regulation would otherwise go into effect unless the commission, in its discretion, extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, or others in lieu thereof, which it shall find to be just and reasonable. All such rates or other charges, classifications, contracts, practices, rules or regulations not so suspended shall, on the expiration of thirty days from the time of filing the same with the commission, or of such lesser time as the commission may grant, go into effect and be the established and effective rates or other charges, classifications, contracts, practices, rules and regulations, subject to the power of the commission, after a hearing had on its own motion or upon complaint, as herein provided, to alter or modify the same. Within thirty days after such changes have been authorized by the commission, copies of the new or revised schedules shall be posted or filed in accordance with the terms of Section 34 of this Act, in such a manner that all changes shall be plainly indicated. * * *"

"Section 38. No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service. * * *"

"Section 64. The commission, or any commissioner, assistant commissioner, or officer of the commission designated by commission, shall have power to hold investigations, inquiries and hearings concerning any matters cov-

ered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the commission may establish. In the conduct of any investigation, inquiry or hearing neither the commission nor any commissioner, assistant commissioner or officer of the commission shall be bound by the technical rules of evidence, and no informality in any proceedings or in the manner of taking testimony before the commission, any commissioner, assistant commissioner or an officer of the commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the commission. All hearings conducted by the commission shall be open to the public. * * *"

"Section 68. Complaint may be made by the commission, of its own motion or by any person or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the commission. In the discretion of the commission, matters presented by one complaint may be ordered separated, and matters upon which complaint may be founded may be joined. No objection shall be sustained to a separation merely because the matters separated are under the ownership, control or management of the same persons or corporation. No complaint shall be dismissed because of the absence of direct damage to the complainant.

Upon the filing of a complaint the commission shall cause a copy thereof to be served upon the person or corporation complained of which shall be accompanied by a notice requiring that the complaint be satisfied and answered within a reasonable time to be specified by the commission or within the discretion of the commission by a notice fixing a time when and place where a hearing will be had upon such complaint. Notice of the time and place shall also be given to the complaint and to such other persons as the commission shall deem necessary. The commission shall have au-

thority to hear and investigate any complaint notwithstanding the fact that the person or corporation complained of may have satisfied the complaint. * * *"

"Section 71. * * * Within thirty days after the service of any rule or regulation, order or decision of the commission any party to the action or proceeding may apply for a rehearing in respect to any matter determined in said action or proceeding and specified in the application for rehearing. The commission shall receive and consider such application and shall grant or deny such application within twenty days from the date of the receipt thereof by the commission. In case the application for rehearing is granted the commission shall proceed as promptly as possible to consider the matters presented by such application. No appeal shall be allowed from any rule, regulation, order or decision of the commission unless and until an application for a rehearing thereof shall first have been filed with and acted upon by the commission. * * *"

"Section 72. Within thirty days after the service of any order or decision of the commission refusing an application for a rehearing of any rule, regulation, order or decision of the commission, or within thirty days after the service of any final order or decision of the commission upon and after a rehearing of any rule, regulation, order or decision of the commission, any person or corporation affected by such rule, regulation, order or decision, may appeal to the circuit or superior court of the county in which the subject-matter of the hearing is situated, or if the subject-matter of the hearing is situated in more than one county, then of any one of such counties, for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined. The court first acquiring jurisdiction of any appeal from any rule, regulation, order or decision shall have and retain jurisdiction of such appeal and of all further appeals from the same rule, regulation, order or decision until such appeal is disposed of in such circuit or superior court. No proceeding to contest any rule, regulation, decision or order which the commission is authorized to issue without a hearing and has so

issued shall be brought in any court unless application shall have been first made to the commission for a hearing thereon and until after such application has been acted upon by the commission, nor shall any person or corporation in any court urge or rely upon any grounds not set forth in such application for a hearing before the commission, but the commission shall decide the questions presented by said application with all possible expedition consistent with the duties of the commission. The party taking such an appeal shall file with the secretary of the commission, written notice of said appeal. The commission, upon the filing of such notice of appeal, shall, within five days thereafter, file with the clerk of the circuit or superior court to which such appeal is taken a certified copy of the order appealed from and within twenty days thereafter the record provided for in section 65. The party serving such notice of appeal shall, within five days after the service of such notice upon the commission, file a copy of said notice, with proof of service, with the clerk of said court to which such appeal is taken, and thereupon said circuit or superior court shall have jurisdiction over said appeal and the same shall be entered upon the records of said circuit or superior court and shall be tried therein without formal pleadings, but otherwise according to the rules governing other civil cases, so far as the same are applicable. No circuit or superior court shall permit a party affected by any rule, regulation, order or decision of the commission to intervene or become a party plaintiff or appellant in such court who has not taken an appeal from such rule, regulation, order or decision in the manner as herein provided.

A circuit or superior court to which any such appeal is taken shall have the power, and it shall be its duty, in term time or vacation, to hear and determine such appeal with all convenient speed. No new or additional evidence may be introduced in any proceeding upon appeal from a rule, regulation, order or decision of the commission, issued or confirmed after a hearing, but the appeal shall be heard on the record of the commission as certified to by it. The findings and conclusions of the commission on questions of fact

shall be held *prima facie* to be true and as found by the commission; and a rule, regulation, order or decision of the commission shall not be set aside unless it clearly appears that the finding of the commission was against the manifest weight of the evidence presented to or before the commission for and against such rule, regulation, order or decision, or that the same was without the jurisdiction of the commission. If it appears that the commission failed to receive evidence properly proffered, on a hearing or a rehearing, or an application therefor, the court shall remand the case to the commission with instructions to receive the testimony so proffered and rejected, and to enter a new order based upon the evidence theretofore taken, and such new evidence as it is directed to receive, unless it shall appear that such new evidence would not be controlling, in which case the court shall so find in its order. Rules, regulations, orders or decisions of the commission shall be held to be *prima facie* reasonable, and the burden of proof upon all issues raised by the appeal shall be upon the person or corporation appealing from such rules, regulations, orders or decisions.

When no appeal is taken from a rule, regulation, order or decision of the commission, as herein provided, parties affected by such rule, regulation, order or decision, shall be deemed to have waived the right to have the merits of said controversy reviewed by a court and there shall be no trial of the merits of any controversy in which such rule, regulation, order or decision was made, by any court to which application may be made for a writ to enforce the same, or in any other judicial proceeding."

"Section 73. Appeals from all final orders and judgments entered by the said circuit or superior court, in review of rules, regulations, orders or decisions of the commission, may be taken directly to the Supreme Court by either party to the action, within sixty days after the entry of the order or judgment of said circuit or superior court, and shall be governed by the rules applying to other civil cases appealed to said Supreme Court, except that formal pleadings shall not be required."

"Section 76. When complaint has been made to the commission concerning any rate or other charge of any public utility and the commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

If the public utility does not comply with an order of the commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in any court of competent jurisdiction a petition setting forth briefly the causes for which he claims damages and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the order of the commission shall be *prima facie* evidence of the facts therein stated. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the action. * * *"

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IN THE

# Supreme Court of the United States

*October Term, 1940*

No. 139.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
*Petitioners,*

*vs.*

ROCKWELL LIME COMPANY, et al.,
*Respondents.*

## REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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## REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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This cause does *not* involve a conflict between the Interstate Commerce Commission and a state commission, as unfortunately is often the case. The cause is presented to this Court because the judgment of the Supreme Court of Illinois affirming the judgment of the Circuit Court of Cook County collaterally and retroactively sets aside and holds for naught administrative determinations and orders entered concurrently by the Interstate Commerce Commission and the Illinois Commission under date of November 30, 1926, and applied in order of dismissal entered herein by the latter Commission under date of January 4, 1933.

The transactions alleged to be involved herein all took place many years ago, viz., during the period September 10, 1925, to February 15, 1927.

## JUDGMENT FINAL WITHIN MEANING OF THE STATUTE.

Respondents' contention that the judgment is not final within the meaning of section 237 (b) of the Judicial Code, as amended, is supported neither by the record nor by the law. The judgment of the Supreme Court of Illinois (R. 238) affirms the judgment of the Circuit Court of Cook County reversing the order of the Illinois Commerce Commission dismissing the complaint (R. 202-204). The judgment of the Circuit Court of Cook County further directs that Commission to award restitution to respondents, leaving the Commission no administrative or other discretion and no opportunity to reexamine the questions presented, and this appears to be conceded by respondents (their brief p. 31).

It is true that, under the judgment herein, the Illinois Commission would have the duty of ascertaining the amount due each of respondents and to enter a reparation order accordingly, but this would be purely a ministerial function. If and when such an order were entered there could be no review thereof by appellate procedure, since the law of Illinois as construed by the Appellate and Supreme Courts of the state does not permit an appeal by a railroad of an order entered by the Commission for the payment of money. *Medusa Portland Cement Co.* v. *Ill. Cent. R. Co.*, 287 Ill. App. 549. *Terminal R. R. Assn.* v. *Utilities Com.*, 304 Ill. 312.

Section 76, chapter 111⅔, Illinois Revised Statutes, 1939, is similar in purport to section 16 (2) of the Interstate Commerce Act (49 U. S. C. sec. 16 (2)) providing for the enforcement of so-called reparation orders of the Interstate Commerce Commission. Each section provides in substance that the person for whose benefit the order was made may file in a court of competent jurisdiction a petition setting

forth briefly the causes for which damages are claimed and the order of the Commission in the premises; that on the trial of such suit the order of the Commission shall be *prima facie* evidence of the facts therein stated, and that if petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the action.

None of the cases cited in respondents' brief in support of their contention that the judgment sought to be reviewed herein is not a final one is relevant. They relate to actions in court and involve no proceedings or procedure before administrative bodies. In the cases cited by respondents although the decision of the Supreme Court of the state remanding the case for further proceedings may have decided certain questions of law, it was still possible for the appellant or petitioner to obtain a review by subsequent appeal. As already pointed out, petitioners herein will be denied a court review of the reparation order entered by the Illinois Commission under compulsion of the courts of that state, since the Illinois statute permits no appeal from such an order.

Illustrative of the cases cited in respondents' brief is *Louisiana Nav. Co.* v. *Oyster Commission,* 226 U. S. 99, wherein this Court dismissed a writ of error to the Supreme Court of Louisiana. The judgment of the trial court had dismissed a petition on the ground that it stated no cause of action. The Supreme Court of that state reversed the judgment of the trial court and permitted an amendment to the petition. This Court specifically pointed out that if and when a final judgment should be obtained this Court would have jurisdiction to review it and to determine all federal controversies in the cause arising during the trials or appeals before the state courts. In the instant case, petitioners repeat, it will not be possible under the law of Illinois to obtain a court review by appeal from the

Illinois Commission's order entered under mandate of the Illinois Supreme Court in this proceeding.

Respondents suggest (their brief p. 36) that, in the event an order for the payment of money should be entered by the Illinois Commerce Commission and suit brought thereon by petitioners, the trial thereof would be *de novo*. But this is not the law. A railroad resisting an order for the payment of money entered by the Interstate Commerce Commission and similarly by the Illinois Commission is confined within narrowly circumscribed limits in respect of a defense. No trial *de novo* is permitted. *Adams* v. *Mills*, 286 U. S. 397. *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 Fed. (2d) 490, certiorari denied 290 U. S. 697. *Penn Anthracite Mining Co.* v. *Delaware & H. R. Corp.*, 16 Fed. Supp. 732. *Delaware & H. R. Corp.* v. *Penn Anthracite Mining Co.*, 91 Fed. (2d) 634, certiorari denied 302 U. S. 756.

Moreover, should an order for the payment of money be entered against petitioners by *judicial fiat* of the Illinois courts they would be confronted with the possibility of being required to pay an attorney's fee (sec. 73, chap. 111⅔, Ill. Rev. Stats., 1939) in the event they should resist payment of the order. The purpose of the provision relating to attorneys' fees is to discourage contests and to promote prompt payment of Commission awards. *Baldwin* v. *Milling Co.*, 307 U. S. 478. The result is that if a reparation order be entered herein petitioners, notwithstanding the fact that both the Interstate Commerce Commission and the Illinois Commerce Commission, acting as public agencies and carrying out duties imposed by the Congress in the interest of shippers generally, *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. ...., had found respondents' cause without merit, would be denied a direct review and subjected to the coercive process of the statute.

It is apparent that the public interest would be placed in jeopardy, since, in view of the rejection of respondents' claims by the Interstate Commerce Commission and the Illinois Commerce Commission as the result of a joint hearing authorized by the Congress, payment of these claims by petitioners should not be made unless and until the questions of law are determined by this Court.

Petitioners invite the Court's attention to *Cobbledick* v. *United States,* 309 U. S. 323, wherein the question of what is a final decision or judgment was given searching scrutiny and careful consideration by this Court. The doctrine of that decision demonstrates beyond question that the judgment herein is final. This Court drew a distinction between ordinary judicial proceedings and proceedings related to an administrative agency, the latter having a finality peculiar to the procedure involved.

This Court pointed out, on page 325 of the decision in the *Cobbledick case,* that *"To be effective, judicial administration must not be leaden-footed."*

This rule applies with particular force to the case in hand, since the Interstate Commerce Commission and the Illinois Commission, the public agencies carrying out duties imposed by the Congress, found respondents' cause without merit as long ago as November 30, 1926.

Petitioners respectfully submit that upon the facts and upon principle the judgment sought to be reviewed is final within the meaning of section 237 (b) of the Judicial Code.

## CONCERNING MISCELLANEOUS ERRORS IN RESPONDENTS' BRIEF.

Respondents in their brief cite, among other cases, *Keogh* v. *C. & N. W. Ry. Co.,* 260 U. S. 156, on the proposition that rates must be applied according to published tariffs. It is not clear, however, what respondents seek to

establish in that regard. The fact is that there were on file tariff schedules which named the rates which respondents are assailing herein. Petitioners filed no cancellation or suspension supplement in respect thereof, since they considered the attempted suspension on the part of the Illinois Commission unlawful and ineffective. As pointed out on pages 4 to 6 and 26 to 29 of the brief in support of petition, petitioners' position was fully sustained by the concurrent orders entered under authority of section 13 (3) of the Interstate Commerce Act by the Interstate Commerce Commission and the Illinois Commerce Commission under date of November 30, 1926, and by the latter Commission's order entered herein under date of January 4, 1933.

In any event, in a situation of the kind here presented compliance with tariff requirements of the state is not controlling. As demonstrated at pages 29 to 41 of petitioners' brief in support of petition herein, the controlling element is the order of the Interstate Commerce Commission as construed and applied by that Commission with the concurrence of the Illinois Commission. As stated in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, obedience was owing while that order was in force.

That the character of this proceeding is misconceived by respondents and by the Supreme Court of Illinois as well, is indicated by the assertion on page 6 of respondents' brief that the controversy "was of a private character between private parties." It is a fundamental principle of regulation of common carriers that all proceedings relating to the collection of freight charges are clothed with a public interest. Petitioners developed this point briefly at pages 42 to 44 of the brief in support of the petition. To the same effect also is *Keogh* v. *C. & N. W. Ry. Co., supra.*

On page 17 of their brief respondents assert that petitioners admitted that the rates charged were not legally applicable on intrastate traffic. The fact is that petitioners

have never at any time admitted that unlawful or illegal rates or charges were at any time applied. On the contrary, they have insisted and now insist that all rates and charges applied on shipments transported by them were strictly in accordance with law.

At page 20 and elsewhere in their brief respondents make the unqualified statement that the question of legality of the charges under consideration was not before the Commissions in the *Chicago Gravel case* and the *Illinois Chicago Gravel case*,* the joint proceeding held under authority of section 13 (3) of the Interstate Commerce Act and resulting in the concurrent orders of November 30, 1926. Respondents' statement, however, is wholly unsupported by and it is directly contrary to the record. Relevant portions of the complaint in the *Illinois Chicago Gravel case* are set forth at pages 135 to 146 of the record. This record shows that in paragraphs (7) (R. 137-140) and (8) (R. 140-141) of the complaint complainants set forth much about the suspension order and the alleged legal effect of defendants' declining to follow it. In paragraph (10) (R. 143-144) of the complaint it is specifically asserted that by reason of failure and refusal of defendants fully to comply with the aforesaid suspension order a dispute has arisen as to the proper tariff charges for the intrastate transportation of mineral aggregates in Illinois, resulting in numerous claims for overcharges. In the prayer for relief complainants ask that defendants be required to refund overcharges and to pay reparation as an award of damages (R. 145). Respondents in that complaint specifically requested that a joint hearing be held by the Interstate Commerce Commission and the Illinois Commission (R. 146).

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* As explained on page 3 of petitioners' original brief, reference to the *Chicago Gravel case* means Interstate Commerce Commission Docket No. 17817, *Chicago Gravel Co.* v. *A. T. & S. F. Ry. Co.*, 118 I. C. C. 633, and *Illinois Chicago Gravel case*, Illinois Commission Docket Nos. 15878, 15539, and 15191, decided in concurrent orders entered November 30, 1926 (Ex. 4 and 6; R. 51-52, 93-134, 147-164).

The implication on page 21 of respondents' brief that the Interstate Commerce Commission in the *Chicago Gravel case* recognized the jurisdiction of the Illinois Commerce Commission in respect of these rates is directly contrary to the fact. As already pointed out, the Interstate Commerce Commission specifically found that as its order in the *Chicago Producers case* * is still outstanding the suspension order of the Illinois Commission did not become effective against petitioners. In two places the Interstate Commerce Commission found that its order in the *Chicago Producers case* was still outstanding (R. 105-124).

It is not apparent what is meant by the assertion on page 21 of respondents' brief that petitioners admitted the jurisdiction of the Illinois Commission but now deny it. The fact is that petitioners have always denied the jurisdiction of the Illinois Commission in respect of these particular rates. In any event, admissions or denials would be of no consequence, since the controlling element is the order of the Interstate Commerce Commission in the *Chicago Producers case,* as construed and applied in the *Chicago Gravel case* and also in the earlier case of *Sand and Gravel between Illinois and Wisconsin Points,* 96 I. C. C. 325 (R. 104).

The assertion on pages 12 and 24 of respondents' brief that petitioners abandoned their plea to the jurisdiction of the Illinois Commission is directly contrary to the record. The fact is that the lack of jurisdiction in the Illinois Commission was asserted in petitioners' amended answer and motion to dismiss (R. 29-32) and a similar motion to dismiss made of record prior to the introduction of testimony (R. 41), and renewed at the conclusion of the hearing (R. 53), and in reply to respondents' petition for rehearing before the Illinois Commission (R. 91).

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* As explained on page 4 of petitioners' original brief, reference to *Chicago Producers case* means Interstate Commerce Commission Docket No. 11490, *Chicago Sand & Gravel Producers* v. *Director General,* 64 I. C. C. 37.

In this connection petitioners invite the attention of the Court to the fact that at no time did respondents take the position before the Illinois Commission that the report and order of the Interstate Commerce Commission in the *Chicago Producers case* was not sufficiently established of record. The provisions of that report and order were admitted in substance by respondents in their brief before the Illinois Commission (R. 66) and in their petition for rehearing before that Commission (R. 89-90). Respondents' contention as to that order was that it was void because not supported by sufficient findings (R. 85, 89).

At pages 39 to 41 of their brief respondents endeavor to create the impression that the Supreme Court of Illinois affirmed the judgment of the Circuit Court setting aside the Commission's order of dismissal because the findings of fact were inadequate. This obviously is not the fact, since under the judgment, as already pointed out, the Illinois Commission is required to award restitution to respondents, there being no discretion to take further evidence or make additional findings of fact.

At page 5 of their brief and elsewhere (pp. 7, 9, 11, 14 and 50) respondents refer to so-called switching charges. What is asserted therein in respect of these charges is wholly irrelevant to this case, since no point was made thereof before the Illinois Commerce Commission. Reference to complainants' brief (R. 63-87) and to their petition for rehearing before the Commission (R. 87-90) shows that none of the alleged switching charges was named and, of course, no argument was presented to the Commission based thereon.

Moreover, the so-called switching charges named by complainants in their brief do not appear representative. The fact is that these so-called charges were arbitraries applying for deliveries on railroads other than the Chicago and North Western or the Milwaukee ranging from $4.00

per car to 2 cents per 100 pounds, and averaged about 30 cents per ton of 2,000 pounds (R. 127). It is apparent that the charge of 30 cents per ton applied for deliveries on other railroads on and after September 10, 1925, made no change in the average charge and was an actual reduction for deliveries to connecting railroads where the charge previous to that date was 40 cents a ton.

At pages 20 and 61 of their brief respondents criticise the rates which the Interstate Commerce Commission found were prescribed in the *Chicago Producers case*, as modified by the general reduction of July 21, 1922. What the Commission found in that case is not open to collateral review at this time. There is nothing wrong with the Commission's arithmetic as respondents suggest. When the general reduction was applied to the rate of 75 cents from Zone II a rate of 70 cents was produced. Deducting a differential of 5 cents resulted in a rate from Zone I of 65 cents (R. 104).

*Chicago Fire Brick Co.* v .*Chicago & N. W. Ry. Co.*, 123 I. C. C. 164, cited in respondents' brief has no application whatever to the situation here involved. This is conclusively demonstrated by the fact that there was no reference to that case in the record before the Illinois Commission.

## CONCLUSION.

In conclusion petitioners again invite the attention of the Court to *Cobbledick* v. *United States, supra,* wherein it was said that "To be effective, judicial administration must not be leaden-footed." Petitioners respectfully submit that this Court should take jurisdiction of this cause, reverse the judgment of the Illinois Supreme Court, and allow the order of the administrative body, the Illinois Commerce Commission, entered under date of January 4, 1933, to remain in effect, thus putting an end to this litigation.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

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## No. 139

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, et al.,
*Petitioners,*

v.

ROCKWELL LIME COMPANY, et al.,
*Respondents.*

## RESPONDENTS' BRIEF IN RESISTANCE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

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## No. 139

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CHICAGO AND NORTHWESTERN RAILWAY COMPANY, et al.,
*Petitioners,*

v.

ROCKWELL LIME COMPANY, et al.,
*Respondents.*

---

**RESPONDENTS' BRIEF IN RESISTANCE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI.**

---

*May It Please the Court*:

The petition herein is for a *writ of certiorari* to the Supreme Court of Illinois to review its judgment, which affirmed the judgment of the Circuit Court of Cook County, Illinois. The judgment of the Circuit Court vacated and set aside an order of the Illinois Commerce Commission and remanded the cause for further proceedings. The said order of the Illinois Commerce Commission dismissed respondents' complaint and declined to determine the issues

presented, to wit, (*a*) whether illegal rates had been imposed upon respondents' intrastate traffic, and (*b*) what were the rates legally applicable thereto as set forth and contained in tariffs lawfully on file with the Commission at the time the shipments in question were made. The judgment of the Supreme Court of Illinois, in reviewing the order of the Circuit Court, determined upon the validity of the Commission's order, declared the law of the case, and affirmed the order of the Circuit Court which contained directions to the Commission to hold further hearings consistent with the findings of the Court and to determine, among other things, the question of damages and the amount thereof (R. 202-204, 237-238).

Respondents respectfully challenge the jurisdiction of this Court in the premises, and herewith submit their objections in said regard and brief in resistance to the petition.[1]

## Judgment of the Court Below.

The judgment of the Supreme Court of Illinois, *Rockwell Lime Co. et al.* v. *Chicago and North Western Railway Co. et al.*, entered February 13, 1940, is reported in 373 Ill. 309, 26 N. E. (2d) 99, and appears at pages 225-237 of the record. The findings, judgment and order of the Circuit Court of Cook County, Illinois, entered March 28, 1939, setting aside and remanding the order of the Illinois Commerce Commission, which judgment and order of the said Circuit Court was affirmed by the Supreme Court of Illinois, appears at pages 202-204 of the record. The order of the Illinois Commerce Commission, No. 18642, *Rockwell Lime Co. et al.* v. *Wabash Railway Co. et al.*, entered January 4, 1933, appears at pages 2-17 of the record.

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[1] Rule 38:3.

## Basis of Jurisdiction Invoked by Petitioners.

The initial or primary ground upon which petitioners rest their application is that the judgment of the Supreme Court of Illinois allegedly constitutes a final judgment or order within the meaning of, and as required by, Section 237 (b) of the Judicial Code, as amended by act of February 13, 1925, 43 Stat. 936, 937 (28 U. S. C. A., Sec. 344). The petition wrongfully alleges that the judgment is final (Pet. p. 10), but it is clear that the action of the Supreme Court of Illinois does not operate to terminate the litigation on the merits in respect of all controlling issues of the case, but instead remands the cause for further proceedings. *Post*, pp. 29-35.

Otherwise, the chief basis of jurisdiction invoked by petitioners, as argued by them (Pet. pp. 13-17), and by which they seek to suggest a federal question in relation to the judgment of the Supreme Court of Illinois, is that the latter's action allegedly operates, in a manner not named, to defeat or conflict with the provisions of Section 13 (3) of the Interstate Commerce Act. [49 U. S. C. A., Sec. 13 (3)]. That provision has relation, however, only to proceedings instituted under Section 13 (4) of the Interstate Act, and the order of the Illinois Commission herein quite obviously is not within the purview of either of the said provisions. *Post*, p. 66.

## Statement of the Case.

Petitioners' statement of the case consists, in the main, of conclusions which, respondents consider, are largely unsupported by the record and which, it is respectfully submitted, unquestionably fail to disclose the issues actually presented to, and resolved by, the Courts below.

In litigation of the present character, a correct factual statement of the matters in controversy and decided is manifestly not only proper but essential and indispensable. To place before this Court that which is necessary to disclose the questions here presented and essential to the proper disposition of the petition and the determination of this Court's jurisdiction in the premises, it is desirable to summarize:

1. The subject matter of the controversy before the Illinois Commerce Commission, the proceedings and issue before that tribunal, the order entered by that Commission, and the predicate therefor.

2. The decision of the Supreme Court of Illinois, the issues upon which the case there turned, and the grounds upon which the decision was based. In that regard it will be developed (*a*) that the judgment is not final, (*b*) that the judgment was premised exclusively upon local law and practice and that no federal question was decided or necessary to the disposition of the controversy, (*c*) that petitioners have an adequate remedy at law, and (*d*) that, on the record, there is an absence of substance to errors alleged by petitioners.

3. The issues and legal effect of certain decisions of the Interstate Commerce Commission and Illinois Commerce Commission to which petitioners refer, which constitute their only evidence in defense, and which chiefly provide the inducive premises for the federal question here sought to be invoked.

## The Order of the Illinois Commission and Proceedings Before That Tribunal.

Respondents' complaint to the Illinois Commission related to rates and charges exacted upon shipments having their origin and destination within the State of Illinois. The complaint alleged that during the period September 10, 1925 to February 15, 1927, petitioners, contrary to the law of Illinois and their tariffs, rates and charges lawfully on file with the Illinois Commission and legally in effect during said period, imposed upon and exacted from respondents in connection with shipments of sand and gravel made by them from their operations located on petitioners' lines to the Chicago (Ill.) switching district rates and charges which were illegal, as distinguished from unreasonable (R. 19-29).

The rates and charges alleged to have been illegal and illegally exacted, as aforesaid, were (1) single line rates, (that is, rates applicable to shipments having their origin and destination on petitioners' lines) of 65 cents per ton, and (2) connecting line switching charges, (that is, charges added to the single line rates, in connection with shipments originating on petitioners' lines but destined to a point on a connecting line) of 30 cents per ton, or about $15.00 per car (Exhibits 1 and 3, R. 42-46, 211-213). The complaint prayed damages and restitution to the basis of rates alleged legally applicable in the premises which, it was averred, were 60 cents single line, and $3.60 per car upward connecting line (R. 19-29, 211-213). The complaint comprehended strictly intrastate commerce, was founded upon and invoked the relief and remedy provided by the laws of the State of Illinois, and more particularly the

Illinois Utilities Act and Sections 32, 36, 37 and 72 thereof (R. 21-29). Ill. Rev. Stat. 1939, Chap. 111 2/3, State Bar Assn. Ed., Pars. 32, 36, 37, 76.

In substance, respondents' action before the Illinois Commission was that at common law for money had and received. The controversy quite obviously was of a private character between private parties. The issue of the action manifestly presented a question of law and the legal effect of the evidence which neither involved nor permitted the exercise of administrative discretion (R. 231).

The genesis of the controversy may be described thus:

On August 10, 1925, petitioners, together with about forty other Illinois carriers, filed with the Illinois Commission a tariff, referred to in the order of that Commission and herein as Agent B. T. Jones tariff, Ill. C. C. No. 171, in which it was proposed, *inter alia,* to change numerous intrastate rates applicable to the transportation of sand and gravel (carload) from various Illinois producing points, including those at which respondents were engaged in operations, to the Chicago (Ill.) switching district. The change was proposed to be accomplished by cancelling tariffs, rates and charges then and theretofore lawfully on file with the Illinois Commission and then legally in effect, and substituting in their place and stead the Jones tariff and rates, which latter were proposed to be made effective September 10, 1925 (R. 42, 46; Exhibits 1 and 3, R. 211-213, 216-218).

So far as here pertinent, there were two principal changes in rates proposed in the Jones tariff from respondents' plants:

*First*: The single lines rates were proposed to be made 3.25 cents per cwt. or 65 cents per ton. The rates contained in tariffs which the Jones schedule sought to cancel were 3 cents per cwt. or 60 cents per ton.

*Second*: The connecting line switching charges were proposed to be made 30 cents per ton or about $15.00 per car. The charges contained in tariffs which the Jones schedule sought to cancel ranged from $3.60 per car upward, the majority of such charges being from $3.60 to $8.50 per car (R. 42-46; Exhibits 1 and 3, R. 211-213).

The intended effect of the Jones tariff was, therefore, to obtain an increase of 5 cents per ton, or about $2.50 per car, in the single line rates, and an increase of as much as $11.40 per car in connecting line switching charges based on an average load of 50 ton per car.

Before the Jones tariff and increased rates therein contained were to become effective, however, the Illinois Commission, acting under and by virtue of the power and authority conferred upon it by Section 36 of the Illinois Act,[2] suspended the said Jones tariff and the proposed increased rates and charges, and declined to permit the same to be made effective on the date proposed, *viz.*, September 10, 1925. The suspension was accomplished by the Illinois Commission's entry of a formal order on August 29, 1925 in a proceeding entitled No. 15539, *et al., In the Matter of the Proposed Changes in Rates, etc.* By the terms and conditions of the latter and supplemental orders entered in the same cause, the Jones tariff and rates were suspended from September 10, 1925 to February 15, 1927 (R. 216-219).

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[2] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 36.

Following the suspension of the Jones tariff and rates, the Illinois Commission entered upon an investigation and hearing with reference to the lawfulness, *i.e.*, reasonableness, etc., thereof, the trial being joined with that of a complaint which had been filed in the interim, and which was entitled No. 15878, *Chicago Gravel Co.* v. *Atchison, T. & S. F. R. Co.* A final order was entered in the consolidated cause on November 30, 1926. That order, so far as it related to the Jones tariff and rates, provided:

> "We further find upon this record that the rates published by the carriers are not justified and that the tariff should be permanently cancelled and stricken from the files of the Commission". (R. 157).

Whereupon, an order accordingly was entered by the Illinois Commission (R. 147-164). The Jones schedule of increased rates and charges thus never became legally in effect on, or lawfully applicable to, intrastate traffic during the period of suspension, September 10, 1925 to February 15, 1927.

Although enjoined by the suspension order of August 29, 1925, and supplemental or re-suspension orders, from making effective and applying the Jones tariff of increased rates, which latter, as related, were ultimately rejected and condemned by the Illinois Commission as "not justified," *i.e.*, not shown to have been reasonable or otherwise lawful, petitioners, both for themselves and the connecting carriers, ignored the orders mentioned and during the period September 10, 1925 to February 15, 1927, imposed upon respondents' shipments the very rates and charges which the Illinois Commission had declined to permit them to make effective and exact (R. 42-46; Exhibits 1 and 3, R. 211-213).

Which is to state that petitioners collected upon shipments originating at respondents' plants and destined to deliveries in the Chicago (Ill.) district on petitioners' lines the suspended single line rates of 65 cents per ton, and where destined to points on connecting lines in that district, collected, as agent for the latter carriers, an additional suspended switching charge of 30 cents per ton, or a total through charge of 95 cents per ton. This represented, as previously set forth, a single line rate charge of 5 cents per ton, or about $2.50 per car in excess of the rates applicable in tariffs lawfully on file and legally in effect at the time shipments were made, and connecting line switching charges as much as $11.40 per car in excess of the legal and lawful charges (R. 42-46, 48-51, 211-213, Exhibits 1 and 3).

Petitioners admit they did not comply with the Illinois Commission's suspension orders, and that, during the period in question, they exacted the Jones schedule of rates and charges rather than those contained in tariffs lawfully on file with the Illinois Commission and the rates therein named and legally in effect (R. 9, 227).

Thereafter, to-wit, on September 21, 1928, respondents, eight in number, and who are producers of sand and gravel with plants located in Illinois on the lines of the petitioners within a radius of fifty miles of the Chicago (Ill.) district,[3] filed a joint and several complaint with the Illinois Commission. The subject matter of that complaint and the issue presented are described *supra,* pp. 5, 6.

[3] Respondents' plants are situate within what in the tariffs is referred to as the "inner zone" or "Zone I". Those terms, interchangeably employed, are used to describe all producing points situate 0-50 miles distant from the Chicago District. The "outer zone" or "Zone II" embraces producing points 51-100 miles distant from the Chicago District (R. 41; Exhibit 4, R. 51, 126, 127).

It may here be repeated, however, that the theory of the complaint was that under the terms of Section 36 of the Illinois Act[4] and the Illinois Commission's suspension orders, the Jones tariff and rates it contained did not, during the period involved, become legally or lawfully applicable, that hence the exaction of said rates was illegal, and, that under the mandate of Section 37 of the Illinois Act,[5] the tariffs and rates which the Jones tariff unsuccessfully sought to cancel remained and continued in effect and constituted the sole and only rates legally applicable (R. 42, 43, 44, 45). The burden of the complaint was that respondents had been "overcharged" on their shipments and the issue was simply whether the rates contained in tariffs lawfully on file with the Illinois Commission and legally in effect had been applied by petitioners. The damages respondents sought were merely return of the amount by which they had been "overcharged" (R. 28-29).

Answering the complaint, petitioners and other defendant carriers in the action before the Illinois Commission, first admitted the jurisdiction of that Commission over both the subject matter and the therein defendants, but otherwise made a general denial (R. 29). Later, an amended answer and motion to dismiss was filed. The latter, strictly affirmative in character, alleged, in substance, (1) that the same issues as presently in controversy had been resolved adversely to respondents in a proceeding known as Ill. No. 15878, and the *Chicago Graval Co. case,* and (2) that a fixed relationship of rates of the specific measure stated in the Jones schedule, or resulting from the claimed relationship, had been prescribed between the intrastate points involved in an order entered

[4] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 36.
[5] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 37.

by the Interstate Commission in a proceeding described as *Chicago Sand & Gravel Producers* v. *Director General,* 64 I. C. C. 37, and that petitioners were enjoined by law to conform to the alleged requirements of the order in the said cause. In the first instance, which was not decided by the Illinois Commission (R. 16-17), the plea was *res adjudicata,* and in the second, that the Illinois Commission was without jurisdiction in the premises, which latter issue was the only thing decided by the State tribunal (R. 29-32, 16-17).

By way of replication, respondents traversed petitioners' amended answer and motion to dismiss in all respects, thereby putting them on strict proof (R. 32-35).

The complaint ultimately came on for trial before the Illinois Commission on February 23, 1932 (R. 40).

To maintain the issue in their behalf, respondents, among other things, (*a*) introduced in evidence the Illinois Commission's suspension orders showing the suspension of the Jones tariff and rates it contained and the final and later rejection and condemnation thereof by the said Commission—in short, established that the said tariff and rates had never become legally in effect or applicable to respondents' traffic; (*b*) submitted in evidence the Illinois tariffs which the Jones schedule proposed to cancel, and which former tariffs contained the rates and charges legally on file with the Commission, and in effect at the time respondents' shipments moved; (*c*) established that the single line rates contained in said latter tariffs were 60 cents per ton, and that the connecting line switching charges similarly contained in said tariffs were $3.60 per car upward; (*d*) established generally that shipments had been made as alleged, and that the Jones tariff rates and charges rather than those

legally in effect, as related, had been exacted thereon. Following a customary practice before the Illinois Commission, details as to the number of shipments, the total tonnage involved, the total amount of damages or overcharges and the paying and bearing of said illegal rates in each instance were, by agreement, reserved pending determination of the geenral issue (R. 201, 206, 211-213, 42-45, 47-53; Exhibits 1 and 3).

Although petitioners in their amended answer and motion to dismiss premised their plea to the jurisdiction of the Illinois Commission and in that regard their defense to respondents' complaint upon the alleged fact and requirements of an order entered by the Interstate Commission in the *Chicago Producers case*, they did not submit such an order in evidence or otherwise establish that there had been an order entered having the legal effect and result attributed to it. The purpose of pleadings being merely to lay a basis for the introduction of evidence, the failure of petitioners to introduce the report and order upon which their defense rested, on the occasion of trial before the Commission, constituted, as the Supreme Court of Illinois in effect said (R. 232, 233, 227), an abandonment of the plea. Hence no issue as to the requirements, if any, of the *Chicago Producers case* was, in fact, before either the Illinois Commission, the Circuit Court of Cook County, or the Supreme Court of Illinois, nor is such an issue before this Court (R. 232, 233).

Petitioners, who called no witnesses, presented the following evidence in the trial before the Illinois Commission: 1. The report of the Interstate Commission in the *Chicago Gravel Co. case* (Ex. 4, R. 51, 92-134). 2. An order of the Illinois Commission in No. 15878 (Ex. 5; R. 51, 134-146). 3. The order of the Illinois Commission in

Docket No. 15539 *et al.* (Ex. 6; R. 51, 147-164). 4. An order of the Illinois Commission in No. 10666, *Chicago Sand & Gravel Producers* v. *Atchison, T. & S. F. R. Co.* (Ex. 7; R. 52, 165-196). Petitioners did not plea, however, that any of the preceding decisions or orders *per se* prescribed intrastate rates from respondents' plants for the period here involved or prior thereto, nor that the Jones tariff rates were responsive to any order entered in the said proceedings, nor that in any of the said decisions it had been held or decided, responsive to any issue presented in those cases, that the Illinois Commission was without jurisdiction of the issue of respondents' complaint (R. 29-32).

The use which petitioners sought to make of said decisions, in the action before the Illinois Commission, was an endeavor to prove by *obiter* remarks appearing therein what had been decided and the legal effect of the *Chicago Producers case,* which was not introduced in evidence and was never before either the Illinois Commission, the Circuit Court of Cook County, or the Supreme Court of Illinois. But in the Supreme Court of Illinois petitioners sought (R. 222) and here seek (Pet. p. 55) to advance the proposition that the rates exacted were reasonable and that petitioners should, therefore, be permitted to retain them. In the final analysis petitioners' position thus was, not a jurisdictional plea, but rather a legal proposition, that if a rate has been prescribed by a commission, it may be imposed irrespective of whether it has been published in a tariff which has become lawfully and legally in effect and in total disregard of the fact that tariffs and rates lawfully on file have not been superseded or cancelled.

On January 4, 1933, the Illinois Commission entered its order in the premises. In that order the Commission summarily dismissed respondents' complaint on the

grounds (*a*) that the Interstate Commission had jurisdiction of the subject matter thereof, and (*b*) that hence the Illinois Commission was without jurisdiction (R. 17). No findings whatever were made by the Illinois Commission showing or even pretending to show from the *Chicago Producers case*, that the Interstate Commission had therein or in any other proceeding prescribed or required the rates and charges published by petitioners in the Jones tariff and exacted from respondents (R. 11-13).

Nor did the Illinois Commission find that the single line rates of 60 cents per ton and the connecting line charges of $3.60 per car upward, the same being those which respondents alleged were legally applicable, had been found by the Interstate Commission in any proceeding to be, for the period involved or prior thereto, unduly prejudicial to shippers in interstate commerce or to constitute an unjust discrimination against or burden upon interstate commerce. Nor did the Commission consider or determine the issue of respondents' complaint, *i.e.*, whether the Jones tariff rates became lawfully in effect or whether illegal rates had been imposed or what the legal rates were as shown by tariffs lawfully on file with it and in effect at the time (R. 2-17).

And the Illinois Commission's order and its disclaimer of jurisdiction was not, in fact, even premised upon the *Chicago Producers case* or any stated requirement thereof, but rested instead upon *quotations* and *dicta* culled from the report of the Interstate Commission in the *Chicago Gravel Co. case* and the order in Ill. No. 10666, in neither of which cases, as the Supreme Court of Illinois remarked (R. 233), was the issue presented by respondents' complaint even remotely involved or decided (R. 10-13, 14-17, 51, 92-134, 52, 165-196; Exhibits 4, 7).

Following the Illinois Commission's denial of respondents' petition for rehearing, in which error was alleged that the order was not based upon competent evidence, that it was contrary to the evidence and not supported by substantial evidence, that it was contrary to the evidence and the law, that the rates in issue were illegal and violative of law, *i.e.*, that the order was unresponsive to the issue of the complaint, that the Commission should have found in respondents' favor, and, that in failing to do so the findings made by the Commission were incompetent to sustain its order (R. 88-90), an appeal was taken to the Circuit Court of Cook County, Illinois. The latter Court, for substantially the same reasons referred to in the opinion of the Supreme Court of Illinois, held the Commission's order void, and reversed and remanded it with directions (R. 202-204).

### Decision of the Supreme Court of Illinois.

In affirming the judgment and order of the Circuit Court, the Supreme Court of Illinois held (1) that the order of the Illinois Commission was invalid and void by reason (*a*) of the failure of the Commission to make requisite findings as required by law, and (*b*) that the basis and premises upon which the order otherwise rested were as a matter of law and fact incompetent to sustain it; (2) that the Illinois Commission clearly had jurisdiction of respondents' complaint, that the Jones tariff rates and charges during the period involved were, as a matter of law and upon the undisputed evidence of record, inapplicable and illegal, the Court holding that as a result of the suspension orders entered by the Commission the said Jones tariff rates had never become lawfully or legally in effect on intrastate traffic during the said period and

that the Commission should have so found, whereupon the Court, by way of affirming the order of the Circuit Court, remanded the Commission's order with the directions to it to hold a further hearing consistent with the Court's findings and determine the amount of the damages or overcharges (R. 234-235). Or, in the words of the Circuit Court, that the order should be "remanded to said Commission for further proceedings in accordance with law" (R. 204).

The Supreme Court of Illinois' finding respecting the invalidity of the Illinois Commission's order because of the absence of requisite findings was premised on the ground that Section 65 of the Illinois Act,[6] specifically required that the Commission make essential findings of fact, that such findings were jurisdictional and conditioned the power and authority of the Illinois Commission to act, and that the Commission was bound to conform to the Illinois law in said regard (R. 234-235).

In declaring the Illinois Commission's order void because unsupported by competent evidence, the Court held, in substance, simply that the Illinois Act[7] required the Commission to base its order on competent evidence of record, and that since the order in the *Chicago Producers case* was not in evidence, the Commission could not base its order thereon, and that, further, inasmuch as neither the *Chicago Gravel Co. case* nor Ill. No. 10666, relied upon by the Commission, and constituting the sole inducement for the order it entered, disclosed either the absence of the said Illinois Commission's jurisdiction, or that the Jones schedule of rates had been prescribed by the Interstate Commission, or that the rates respondents alleged legally

[6] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 69.
[7] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 69.

applicable had been found to be unduly prejudicial or unjustly discriminatory in respect to interstate commerce or shippers therein, the order of the Illinois Commission was not supported by either competent or substantial evidence, and was, therefore, "arbitrary and unreasonable in the extreme and is void" (R. 232-233, 235).

In holding that the rates and charges of which respondents complained were illegal and that the Illinois Commission should have so found, the Court said, in effect, that, as previously indicated, the Jones tariff and rates did not become legally applicable or in effect, that the suspension orders of the Illinois Commission itself conclusively demonstrated that fact, that Section 37 of the Illinois Act,[8] required that tariffs, rates and charges lawfully on file with the Commission and legally in effect at the time shipments moved should be observed, that the Commission had no discretion but to enforce the mandate of the statute in said particular, and that since it was admitted by petitioners and otherwise established of record that the Jones tariff rates were not legally applicable on intrastate traffic during the period involved, it resulted that the rates and charges contained in tariffs filed pursuant to requirements of Section 33 of the Illinois Act[9] were thus, as a matter of law, legally applicable, and that the Illinois Commission was accordingly bound to conform its action to the evidence and the law in this latter regard (R. 236, 227, 231).

The "issue presented to the commission," observed the Court, "was simply whether the correct and legal tariff rate had been applied" (R. 231). The Court, thereupon, directing its remarks to that issue, considered the legal

[8] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 37.
[9] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 33.

effect of the evidence and to what relief respondents were affirmatively entitled, and, thereafter, declared the law of the case, its judgment in that regard being premised upon the proof of record and the requirements of the Illinois Act in relation thereto. In short, the Court held that affirmatively the issue was controlled by local law and practice and that the Illinois Commission was bound to observe and give effect to the mandates of the applicable laws of Illinois (R. 227, 226, 236).

The Court gave very careful consideration, as its opinion abundantly evidences, to petitioners' contentions, most of which are renewed here, and found them untenable. In rejecting such contentions the Court, among other things, held that the question of the inherent reasonablenss of rates involved was not open to review since no issue was before the Illinois Commission in that regard or decided by either the latter or the Circuit Court (R. 226, 227, 230, 231, 233); that the question of whether the issue of the present action had been decided adversely to respondents by the Illinois Commission in Ill. No. 15878 was not decided by the Commission in the order under review or by the Circuit Court in the instant litigation and was hence not now open to review (R. 236); the Supreme Court of Illinois stated, however, that the rule of *res adjudicata* was not applicable to administrative agencies (R. 236) and that, in any event, Ill. No. 15878 did not decide the issue of respondents' complaint (R. 233); that the entry of an order in the *Chicago Producers case* or any requirements thereof could not be proved by extraneous remarks from the *Chicago Gravel Co. case* or Ill. No. 10666 (R. 233); that the jurisdiction of the Illinois Commission could not be defeated by mere claims, admissions, or self-serving declarations (R. 235); and then, after reviewing the

authority of the Interstate Commission in respect of intrastate rates (R. 231-232), the Court stated that no issue was presented as to the "paramount authority of the Interstate Commerce Commission to regulate the relationship between interstate and intrastate rates" (R. 232), whereupon the Court declined to construe any order of the Interstate Commission of record, or otherwise, declaring that such considerations did not relate to the "decisive question" presented (R. 235). Respondents distinguish between the basis of the Courts' judgment and the mere rejection of petitioners' contentions.

No judgment or order has been entered by the Supreme Court of Illinois requiring petitioners to pay damages in any specified amount. Nor does the Court's opinion require the Illinois Commission to enter an order requiring payment of any specified amount named in the opinion of the former. On the contrary, the judgment requires *further proceedings* before the Illinois Commission with the amount of damages left open, and contingent, of course, upon respondents' establishing by competent proof the extent and number of shipments made by them, and that in each instance they paid and bore charges exacted thereon which showing would be necessary (*Post*, pp. 29-36) to entitle them to damages (R. 225-237, 49, 53).

## The Decisions of the Interstate Commission and Illinois Commission Upon Which Petitioners Rely.

As already stated, petitioners in the action before the Illinois Commission, on appeal to the Supreme Court of Illinois, and before this Court, relied and rely, respectively, not upon the *Chicago Producers case* which they pled as a defense, but rather upon reports and orders in the *Chicago*

*Gravel Co. case,* 118 I. C. C. 633, and Ill. Nos. 10666 and 15878 (Pet. pp. 2-8; R. 2-18, 51-52, 92-196, 225-237; Exhibits 4, 6, 7). No issue was before the Interstate Commission in the *Chicago Gravel Co. case* respecting the jurisdiction of the Illinois Commission to resolve the question of illegality of rates to which respondents' complaint appertains (R. 92-96, 123-125). Nor did Ill. No. 10666 or No. 15878 concern or decide any such issue (R. 165-166, 192-195, 147, 149, 156-157).

In the *Chicago Gravel Co. case* the Interstate Commission affirmatively did nothing more than prescribe and order *interstate* rates for the future, that is, for the period subsequent to the respondents' last cause of action—on and after February 15, 1927 (R. 132-133).[10] Ill. No. 15878 did likewise in respect of interstate rates (R. 157-158). Ill. No. 10666 concerned a complaint filed in 1920 and presented issues in relation to the reasonableness, not illegality, of rates in effect at that time. That complaint thus involved a cause of action arising about two years prior to the date of the order in the *Chicago Producers case* and about five years prior to the time of the filing of respondents' complaint herein and five years prior to the publication of the suspended Jones tariff, and consequently, on the face of the matter, dealt with different issues from those involved herein (R. 165). There was thus no occasion for the Supreme Court of Illinois to construe the orders mentioned in relation to petitioners claims of conflict between decisions of the State and Federal commissions, nor, as stated, did it do so (R. 231-233).

[10] It is true, of course, that certain extraneous statements were made in a footnote to the report by the Interstate Commission. This footnote is erroneous because of the fact that no change was made in the Inner Zone intrastate rates, and there was nothing in the interstate order from which an appeal could be taken (R. 103). The Commission also made reference to the measure of rates allegedly resulting from the **Chicago Producers case** (R. 104), but its **dicta** in the latter respect is clearly erroneous as a matter of simple arithmetic. **Post**, p. 61.

Moreover, in the *Chicago Gravel Co. case* the Interstate Commission expressly recognized the jurisdiction of the Illinois Commission in respect of intrastate rates (R. 125). And it denied that the Jones tariff intrastate rates had been prescribed by it (R. 104). And the Jones interstate connecting line switching charge of 30 cents per ton was condemned therein as unreasonable (R. 123, 124). In Ill. No. 15878 the Illinois Commission similarly denied that the Jones tariff rates had been prescribed for the period here involved (R. 152). Furthermore, the latter Commission therein declared and exercised its jurisdiction in respect of intrastate rates by prescribing rates for the future (R. 159-160). And in a companion order in No. 15539 *et al*, it exercised jurisdiction in relation to intrastate rates during the period involved in respondents' complaint by first suspending and later rejecting the Jones tariff charges (R. 157). It is also true and significant that petitioners did not challenge the authority of the Illinois Commission to deal with the Jones tariff rates in the suspension proceedings (R. 226). In other words, petitioners in the suspension proceedings admitted the jurisdiction of the Illinois Commission which they now seek to deny.

## Errors in Petitioners' Statement.

While the statement of the case set forth by respondents correctly reflects the record, it will be helpful to this Court, we believe, to have specifically pointed out some of the errors and inaccuracies in petitioners' statement:

1. There is no ground whatever for petitioners' statement (Pet. pp. 1-2) that the Supreme Court of Illinois held that orders of the Interstate Commission could be defeated or set aside collaterally by state courts or that the Illinois Supreme Court did so. The Supreme Court of

Illinois did not decide any such issue, but on the contrary held that a question of that character was not before it. In that regard, the Court held, in effect, that petitioners' plea to the jurisdiction of the Illinois Commission constituted, in the first instance, an affirmative defense, which to sustain required petitioners to submit in evidence the report and order in the *Chicago Producers case*, and establish as a matter of fact and law that they had the legal effect and result attributed to them (R. 231-233, 235). Of course, as previously stated, the Court later held that the ultimate issue could not be controlled by any requirement of the Interstate Commission. *Ante*, p. 19. In short, what petitioners complain of in the opinion of the Court does not, as they represent, constitute the basis of the Court's decision, but amounts rather to the rejection of petitioners' contentions, all of which is a matter of practice and procedure.

2. The joint hearing held by the Interstate Commission and the Illinois Commission in the *Chicago Gravel Co. case* and Ill. No. 15878 (Exhibits 6, 7; R. 51, 52, 147-164, 165-196) under the provision of Section 13 (3) of the Interstate Act did not, as petitioners infer (Pet. pp. 1-2, 13, 21), relate to the issue of respondents' complaint in the instant proceeding (R. 147-157; Exhibit 4, R. 51, 92, 95). Furthermore, Section 13 (3) of the Interstate Act[11] confers no jurisdiction or power upon the Interstate Commission to hold a joint hearing with a state commission in respect of any issue before the latter relating to illegality of intrastate rates or over-charges on intrastate traffic arising from the failure to properly apply intrastate tariffs. These questions are within the exclusive competence of the state to determine. Moreover, any act of the Interstate Commerce Commission under Section 13 (3) must be coupled with further action under Section 13 (4), which is absent in this case.

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[11] C. 104, 24 Stat. 383, U. S. C. A. Title 49, 13 (3), 13 (4).

3. There is no basis in fact for petitioners' statement (Pet. p. 4) as to the requirements of the *Chicago Producers case.* Neither the report nor order therein was a matter of evidence and no provision or requirement of the Interstate Commission therein was established of record. Hence the Supreme Court of Illinois did not construe said case or determine its legal effect (R. 228-229, 232, 233). The Court especially stated:

> "No question is presented as to the paramount authority of the Interstate Commerce Commission to regulate the relationship between interstate and intrastate rates." (R. 232).

4. As elsewhere noted, *ante,* pp. 16, 18, 20, 22, neither the order in the *Chicago Gravel Co. case* or Ill. No. 15878 (Pet. pp. 2-3) concerned or decided any jurisdictional issue of respondents' complaint here adversely to them, for no such issue was before either of the tribunals in the cases cited (R. 92-134, 165-196).

5. Nor did the complaint in Ill. No. 15878, (Exhibit 6, R. 51, 147-164) as petitioners represent (Pet. p. 3), present the same issue as the complaint in the present action (R. 149, 156). In its order responsive to the complaint in No. 15878 (Exhibit 6; R. 51, 147-164), the Illinois Commission said that it was considering as the issue before it the "reasonableness" of rates in effect "for the several years last past" (R. 155), rather than the question of the illegal exaction of the Jones schedule rates, and the limited period during which they were under suspension. The Illinois Commission, moreover ,in the order in the present controversy, did not decide the issue petitioners seek to raise in this regard (R. 17), nor did the Supreme Court of Illinois decide such an issue (R. 236). Petitioners' contention in this particular is, therefore, not open to review in this Court.

6. Petitioners' repeated assertions (Pet. pp. 4 *et seq.*) as to the alleged requirements of the order in the *Chicago Producers case* are, as already intimated, nothing but their own unsupported conclusions. Petitioners do not refer this Court to any provision or requirement set forth in the report or order in the case cited sustaining the claims they make. Moreover, neither the Illinois Commission nor the Supreme Court of Illinois was referred to any provision of the report or order in the *Chicago Producers case* showing that the Federal commission had assumed jurisdiction over the rates presently involved, or had, for the period involved, prescribed the Jones tariff rates and charges exacted from respondents (Exhibits 4, 5, 6, 7; R. 51, 52, 92-196, 11-13, 233). The reliance on decision of the *Chicago Producers case* was abandoned by petitioners in the manner previously set forth, and they relied not upon it, but upon the *Chicago Gravel Co. case* and Ill. No. 10666 (Exhibits 4 and 7; R. 51-52, 92-134, 165-196), which proved nothing germane to the case (R. 233).

7. It was not admitted of record before the Illinois Commission, as petitioners infer (Pet. p. 5), that the Jones schedule of rates was prescribed by the Interstate Commission, or that in petitioners' failure to publish said rates a violation of the order in the *Chicago Producers case* would result (R. 46-47). Respondents' position was clearly that the rates and charges exacted from them were illegal, and that the Jones tariff intrastate rates and charges had never been prescribed by any Commission for the period involved, and had never become legally applicable during such period (R. 42-45).

8. Petitioner's representation (Pet. p. 6) that both the Interstate Commission and the Illinois Commission fixed a single line rate of 65 cents as reasonable for the trans-

portation of respondents' shipments during the period to which the latter's complaint appertains is not the fact. The evidence conclusively establishes (1) that in the *Chicago Gravel Co. case* the Interstate Commission prescribed rates —and only interstate rates—for the period on and subsequent to February 15, 1927 (R. 132, 211, 227); (2) that in Ill. No. 15539 (Exhibit 6; R. 51, 147-164) the Illinois Commission condemned as "not justified", *i.e.*, unreasonable, etc., single line rates of 65 cents, and the connecting line switching charge of 30 cents per ton for the period September 10, 1925 to February 15, 1927 (R. 157, 159-163); and (3) that both Commissions, in the cases cited, condemned the connecting line switching charge of 30 cents per ton as unreasonable for the future (Exhibits 6, 4; R. 51, 157, 158, 123-124).

9. There was no issue presented before the Illinois Commission, or error brought to the Supreme Court of Illinois or pled by petitioners before the Illinois Commission respecting the alleged failure of respondents (Pet. p. 7) to seek judicial review of numerous orders and decisions and it is not clear what the argument in such regard has to do with the present controversy (R. 3-5, 225-236, 29-32).

The issue before the Supreme Court of Illinois, it may be repeated, was not as to what may have been decided in some other proceeding, but whether (1) the order of the Illinois Commission was valid, and (2) if not, to what relief respondents were entitled as a mater of law, and upon the evidence of record (R. 232-236). Those were the only issues decided by the Circuit Court of Cook County, Illinois, to which the decision of the Supreme Court of Illinois was necessarily confined (R. 230).

10. The statement (Pet. p. 6) that the effect of the decision of the Supreme Court of Illinois is to afford respondents a retroactive rate advantage over other intra-

state shipments in the inner or Zone I is wholly erroneous. The Illinois Commission suspended the Jones tariff intrastate rates from all points in said zone (R. 216-219). If petitioners have exacted the Jones basis from other intrastate shippers than respondents, the former have the same remedy as respondents invoked before the Illinois Commission. Besides that, the record fails to disclose that all Illinois carriers, except petitioners, did not comply with the suspension orders of the Illinois Commission, so that the effect of petitioners' ignoring those orders and exacting the higher Jones schedule of rates was to place respondents at a single line rate disadvantage of 5 cents per ton, and connecting line switching charge disadvantage of as much as $11.40 per car in relation to the rates enjoyed by their competitors situated on other lines, but competing in a common market (R. 7, 43, 215). Aside from the foregoing, no issue was before or decided by the Supreme Court of Illinois in its decision herein in such regard.

11. Contrary to petitioners' declaration (Pet. p. 8) respondents admitted nothing in regard to and traversed the former's amended answer before the Illinois Commission in all respects (R. 32-36, 236).

12. There are other errors in petitioners' statement which are so palpable that they refute themselves. For instance, the continual reference that the Court was passing upon administrative questions resolved adversely by the two commissions in prior decisions. As we hereinafter will show, no such questions are involved in this case. There is nothing in this case except questions of law.

13. The reparation referred to by petitioners (Pet. p. 3) was based upon a claim for reparation for the differ-

ence between the legal rate of 60 cents per ton and the claimed rate of 40 cents per ton. (Appendix B to Exhibit 6; R. 51, 215). This, however, was a prayer for damages because of alleged "unreasonable" rates and not "illegal charges". The point has nothing to do with this case.

## Objections to the Jurisdiction and Summary of Points Argued.

1. The judgment of the Supreme Court of Illinois does not constitute a final judgment or order upon which a writ of certiorari may isue. Petitioners have a complete and adequate remedy at law.

2. The judgment of the Supreme Court of Illinois rests exclusively on non-federal grounds. No federal question was presented or decided. Nor was a decision respecting a federal question necessary to a disposition of the litigation.

## ARGUMENT.

### I.

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS DOES NOT CONSTITUTE A FINAL JUDGMENT OR ORDER UPON WHICH A WRIT OF CERTIORARI MAY ISSUE. PETITIONERS HAVE A COMPLETE AND ADEQUATE REMEDY AT LAW.

Respondents respectfully submit at the outset that, wholly aside from other considerations, the petition herein does not conform to, or satisfy the requirements of, section 237 (b) of the Judicial Code, as amended by act of February 13, 1925, 43 Stat. 936, 937 (28 U. S. C. A. sec. 344). Among other things, the latter provides that primarily and in the first instance there must be a "final" judicial order or judgment before the jurisdiction of this Court to issue a writ of certiorari may be invoked. The judgment of the Supreme Court of Illinois herein does not constitute such a "final" order or judgment—no judgment or decree for the payment of damages in any specific or named sum has been entered. In an ultimate or conclusive view, therefore, petitioners are not confronted with any requirement which presently subjects them to injury. A concomitant of the proposition stated is that petitioners have, or, if ultimately subjected to any adverse order or judgment will have, a complete and adequate remedy at law.

THE JUDGMENT IS NOT A FINAL JUDGMENT.

In reviewing the order of the Circuit Court of Cook County, Illinois, and in connection therewith the order of the Illinois Commission, the Supreme Court of Illinois addressed its decision to two principal propositions or considerations:

1. It determined the validity of the Commission's order as it dismissed respondents' complaint, the necessary result of the Court's conclusion in that regard being the remanding of the cause for further proceedings (R. 233-234, 235).

2. It resolved the question of law presented, determined the legal effect of the evidence, remanded with directions to the Commission to observe its findings in such particulars and, in a *further proceeding,* determine the amount of damages, if any, to which respondents, upon the establishing of their legal rights in the latter regard, would be affirmatively entitled under the law of the case (R. 227, 236, 237).

The action of the Court in the first instance does not, in contemplation of law, subject petitioners to any prejudicial or adverse requirement or order in any final or ultimate sense. Nor is the action of the Illinois Court in that regard open to review in this Court.

In essential respects, the setting aside of or holding void and merely remanding an order of a state commerce commission agency resembles a situation where, in an action at law for example, a new trial may be granted by the trial court, or, where on appeal, a state supreme court sets aside and reverses a judgment of a lower court and remands for

a new trial or further proceedings. The general rule is that the granting of a new trial by the trial court does not *per se* constitute a final order or an appealable issue, which is similarly the case where a state appellate court reverses and remands without requiring the entry of any final judgment or order of a definite, conclusive, or terminating character. *Ark. Valley Land & Cattle Co.* v. *Mann*, 130 U. S. 69; *Phillips* v. *Negley*, 117 U. S. 665; *Wilson* v. *Moore*, 16 U. S. (3 Wheat.) 433; *Cal. Nat. Bank* v. *Stateler*, 171 U. S. 447; *Schlosser* v. *Hemphill*, 198 U. S. 173. A like conclusion, it is submitted, is proper in respect of the action of the Supreme Court of Illinois affirming the order of the Circuit Court so far as the latter sets aside and merely remands the order of the Illinois Commission and the point need not be further considered.

In the second instance, which is presently the more important, the Court, after first declaring the Illinois Commission had jurisdiction in the premises, held that upon the evidence before the Commission, the Jones rates and charges were, as a matter of law, illegal, that the tariff and rates which the Jones schedule sought to cancel were legally applicable, and, by way of affirming the order of the Circuit Court, not only remanded but returned the cause to the Commission with directions to give effect to the Court's findings and hold a further hearing in relation to the question of damages and respondents' legal rights thereto (R. 236-237). While the decision of the Court upon the evidence and pleadings before it quite clearly constitutes the law of the case, it is equally manifest that the Court has entered no judgment or decree for the payment by petitioners of any fixed or specified damages, or amount of money, nor has it in fact or law required the entry of any such order (R. 236-237).

The question of damages and the amount thereof is expressly left open by the Court's decision. The judgment is not final in that regard. For to say that the Court determined the general issue of the controversy on its merits and held that thereunder respondents would be entitled to restitution does not mean that the latter have been awarded damages or that the Illinois Commission is given an absolute mandate to award restitution. While, in other words, respondents could not recover unless the general issue was resolved in their favor, it is also true that, even though the general issue was so determined, they still could not prevail until they established that they paid and bore the illegal charges. If, as to each shipment made, they did not show that, in fact or law, they themselves had sustained the injury of the illegal exaction of the rates in question, respondents could not prevail. *Cf. Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117; *Southern Pacific C.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217; *Adams* v. *Mills*, 286 U. S. 397.

A further hearing is to be held by the Illinois Commission in the foregoing regard. Respondents on that occasion are to present proof of their paying and bearing the illegal charges, the number of shipments made, the total tonnage thereof, and, based thereupon, the total amount of overcharges exacted.[12] The Illinois Commission, on a further hearing, would be bound to hold that the Jones tariff rates were illegal and lower rates legal during the period involved, but the question of respondents' right to restitution and the amount thereof is left open to the Com-

[12] Only a general showing of shipments was presented to the Commission. Details as to the number of shipments, tonnage, etc., and respondents' paying and bearing of illegal charges in each instance, conditioning their right to damages, reserved pending determination of the general issue before the Commission (R. 47, 53).

mission, in relation to which it may exercise its own discretion and independent judgment.

Presumably, satisfactory proof having been submitted by respondents in the preceding particulars on a further hearing and the record on a new trial otherwise remaining as at present, the Illinois Commission would enter an order awarding damages. That, however, has not occurred.

We say damages would "presumably" be awarded for the reason it is conceivable that respondents might fail in their proof.

Again, it is possible, though admittedly not probable, that petitioners would not proceed further with the litigation. It is hence patent that in the aforesaid respects the final or ultimate result or effect of the judgment of the Supreme Court of Illinois, so far as damages are concerned, is purely a matter of speculation and conjecture.[13]

The question is, then, whether an order or judgment which declares the law of the case and remands with directions accordingly constitutes a "final" decree or order contemplated by Section 237 (b) of the Judicial Code. This Court has consistently held that it does not.

In *Bruce* v. *Tobin,* 245 U. S. 18, it was thus stated (pp. 19, 20):

> "It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the

[13] Unless and until petitioners are confronted with a judicial order for payment of damages, it would appear that argument as to the final and injurious effect of the Illinois Court's opinion is both premature and academic. **Post,** pp. 34-36.

general principles by which that right was to be measured. But that contention is not open, as it was settled under [sec.] 709, Rev. Stat. [sec.] 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered,—a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. *Haseltine* v. *Central Nat. Bank,* 183 U. S. 130, 46 L. ed. 117 22 Sup. Ct. Rep. 49; *Schlosser* v. *Hemphill,* 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *Louisiana Nav. Co.* v. *Oyster Commission,* 226 (20) U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 418, 419, 59 L. ed. 1027, 1029, 1030, 35 Sup. Ct. Rep. 625.

"There being, then, no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is denied."

*Schlosser* v. *Hemphill,* 198 U. S. 173 is to the same effect. Therein it was declared (p. 176):

"Doubtless the conclusions arrived at by the state supreme court, and expressed in its opinion, furnish the grounds on which the court below must proceed when the case goes to a decree there, if no change in pleadings or proof takes place, but we cannot say what action might nevertheless be taken, and as no decree was entered in the supreme court * * * we think the writ of error cannot be maintained."

To the same effect: *George, R. etc. Co.* v. *Decatur,* 262 U. S. 432; *American Steel Foundries* v. *Whitehead,* 256 U. S. 40; *Simmons Co.* v. *Grier Bros. Co.,* 258 U. S. 82; *Wilshire Oil Co.* v. *U. S.,* 295 U. S. 100; *Washington* v. *Superior Court,* 243 U. S. 251; *Laclede Gas Company* v. *Public Utilities Comm.,* 304 U. S. 398; *County of St. Clair* v. *Lovingston,* 18 Wall. 628.

The soundness of the rule established in the preceding cases in relation to the case at bar may be easily demonstrated. Even if it be assumed that the Supreme Court of Illinois has affirmatively required entry of a final order by the Illinois Commission, and that the measure and amount of damages is ascertainable from the Court's opinion in relation to the record before it, with the result of leaving the Commission no discretion upon a further hearing but to simply perform a ministerial act, the only legal effect of the action of the Supreme Court of Illinois is to require the entry of a quasi-judicial order which itself is neither final nor appealable.

The latter is so for the reason that an award of damages by a commerce commission is not a "final" judicial determination or judgment. Section 237 (b) of the Judicial Code patently comprehends a "final" judicial order or judgment. But an award by a commission and the order by which it is entered is merely *prima facie* evidence. Both the *Interstate Act*[14] and the *Illinois Act*[15] so provide. Those Acts also provide that if an order of a commission awarding damages is not voluntarily complied with, the parties in whose favor the award runs can recover only by bringing an action at law. In other words, an order awarding damages does not in law or in a legal view subject a defendant carrier to any judicial mandate or command to which it must absolutely respond or in relation to which there may be execution or levy. *Terminal R. R. Assn.* v. *Utilities Comm.*, 304 Ill. 312, 136 N. E. 797; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Southern R. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297; *Penn. R. Co.* v. *Jacoby & Co.*, 242 U. S. 89; *Penn. R. Co.* v. *Weber*, 257 U. S. 85.

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[14] C. 91, Sec. 424, 41 Stat. 491, U. S. C. A. Title 49, Sec. 16, Par. 2.
[15] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 76, Sec. 72.

Since, then, in the view most favorable to petitioners, the Supreme Court of Illinois has done no more than require the entry of an order by the Illinois Commerce Commission having only *prima facie* evidential character, it inexorably results that no final judicial order or mandate has been entered—no more, in other words, can be imputed to the decision of the Supreme Court of Illinois than that which results therefrom so far as any final or ultimate mandate or decree is concerned. Stated otherwise, it follows as a necessary consequence that inasmuch as the order the commission is required to enter is not final or appealable, the action of the Supreme Court of Illinois in that particular could have no different legal efficacy than what it ordered. Which proposition means simply that if the order which is responsive to the decision of the Supreme Court of Illinois is not appealable, the action of that Court by which such an order results is also not appealable or presently subject to judicial review by this Court.

Finally, there is another consideration disclosing the absence of finality to the judgment of the Illinois Supreme Court. Should this Court grant a *writ of certiorari* herein, consider the controversy upon its merits, and affirm the judgment of the Supreme Court of Illinois, its action in so doing would not be final or terminate the litigation. It would, in that event, still remain for the Illinois Commission to hold a further hearing in relation to the question of damages. And when and if that Commission entered such an order petitioners could try every error they bring now anew and presumably prosecute the litigation to this Court again. *Cf. Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Washington* v. *Superior Court*, 243 U. S. 25.

In brief, the judgment of the Supreme Court of Illinois is shown in the latter regard to be not final by the fact that petitioners have, or if ultimately subjected to an adverse order will have, a complete and adequate remedy at law. We briefly consider the latter question.

### Petitioners Have an Adequate Remedy at Law.

As stated, there are to be further proceedings before the Illinois Commission. If on that occasion the Commission enters an order awarding damages, petitioners may, as elsewhere noted, decline to voluntarily comply therewith, and force respondents to an action at law to recover. In such an action the trial would be *de novo*. *Western, N. Y. & P. R. Co.* v. *Penn. Refinery Co.*, 209 U. S. 208; *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117. The fact that proceedings in court would be *de novo* means that despite a decision of this Court on the merits of the case affirming the action of the Supreme Court of Illinois here, petitioners, in a suit by respondents to recover based on the Commission's order awarding damages, could there interpose most, if not all, of the objections they urge now, and other defenses which might be available and tenable. The method outlined, *i.e.*, waiting until respondents bring an action at law to obtain damages after the Commission enters an order in that regard, is, in fact, the only way in which there can be a judicial determination on the question of damages, and a final and appealable judicial order or judgment entered awarding damages. Both of the considerations which would result in the latter instance are lacking here. *Terminal R. R. Assn.* v. *Utilities Commission*, 304 Ill. 312, 136 N. E. 797; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Southern R. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297; *Penn. R. Co.* v. *Jacoby & Co.*, 242

U. S. 89; C. 91, Sec. 424, 41 Stat. 491, 49 U. S. C. A., Sec. 16 (2); Ill. Rev. Stat. 1939, Chap. 111 2/3, Par. 76, Sec. 72.

The procedure described rather than that petitioners here seek to pursue, is that ordinarily followed, and from the standpoint of judicial review it is only after a Court order awarding damages is entered that errors of the character presently advanced by the petitioners are triable. For, as a three-judge statutory Court well said in *Brady* v. *Interstate Commerce Commission*, 43 Fed. (2d) 847, if a commission enters an order awarding damages and no suit is brought thereon, the order "amounts to nothing and could not, of course, be the cause of irreparable injury. * * *"

It would appear, then, both that no basis exists upon which, in the first and primary instance, a *writ of certiorari* may issue, and that petitioners have misconceived their remedy in here and at this time seeking review by *writ of certiorari.*

## II.

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS RESTS EXCLUSIVELY ON NON-FEDERAL GROUNDS. NO FEDERAL QUESTION WAS PRESENTED OR DECIDED. NOR WAS A DECISION RESPECTING A FEDERAL QUESTION NECESSARY TO THE DISPOSITION OF THE LITIGATION.

There are other fundamental objections to the jurisdiction of this Court in the premises, and they may be briefly summarized as follows:

1. The judgment of the Supreme Court of Illinois rests exclusively on local law and practice, and thus on non-federal grounds.

2. The Supreme Court of Illinois decided no question of federal law, and none was before it.

3. The judgment rests upon grounds independent of any question of federal import.

4. A ruling upon federal questions was not necessary or essential to the decision reached by the Supreme Court of Illinois.

5. If the Supreme Court of Illinois construed, rather than merely applied, any statute, it was a state act, and, in matters of the character here involved, the construction thereof presents no federal question.

6. In declaring the law of the case and remanding the cause to the Illinois Commission with directions to give effect to its findings, the Supreme Court of Illinois merely applied local law and determined the legal effect of the evidence, all being matters not open to review in this Court.

7. On the merits, there is an absence of substance to petitioners' claims respecting the lack of jurisdiction of the Illinois Commission and the alleged error by the Supreme Court of Illinois in its ruling in said regard.

## The Basis of the Supreme Court of Illinois' Judgment.

It is elementary that the jurisdiction of this Court herein must turn upon and be resolved not by the mere claims of petitioners, but rather by what the judgment of the Supreme Court of Illinois itself discloses was decided, and the basis upon which the decision rests. *Cf. Minneapolis & St. P. R. Co.* v. *P. & P. U. R. Co.*, 270 U. S. 480; *Millinger* v. *Hartupee*, 73 U. S. 258; *U. S. Fidelity & Guarantee Co.* v. *State of Oklahoma*, 250 U. S. 111. And this Court will readily recognize the familiar rule that in

a broad and fundamental sense the question presented on an appeal from an order of an administrative agency is, first, the lawfulness of the order, and, second, where the issue otherwise involved is one of law, what the correct rule of law is and the legal rights of the litigants thereunder in relation to the pleadings, which, in the present action, are premised upon the provisions of the Illinois Act.

We have already suggested (*ante*, p. 29) that the judgment conveniently divides itself into two parts: 1. That part which holds invalid and void the order of the Illinois Commission. 2. That part which decides the law of the case, and remands the cause with directions.

*First*: The order of the Illinois Commission was held invalid on two grounds, to-wit, that the Commission failed to make essential findings as required by Illinois law, and, that the "evidence" upon which the Commission relied was incompetent to sustain its order.

In respect of the fatal absence of essential findings, the key to what the Supreme Court of Illinois held is found in the following language appearing in the opinion (R. 234-235):

> "Section 65 of the Public Utilities act requires the Commerce Commission, at the conclusion of a hearing upon any complaint, to make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. This court has on numerous occasions announced that the findings of the Commerce Commission under section 65 must be sufficiently specific to enable an intelligent review of the commissions' decision and to ascertain whether the facts, as found, afford a reasonable basis for the order entered. * * * When an administrative agency is required, as a condition precedent to an order, to

> make a finding of facts, the validity of the order must rest upon the needed finding. Where lacking, the order, it follows necessarily, is ineffective. * * * The order in this proceeding does not contain a single statement from the decision and order in the Interstate Commerce Commission proceeding which it holds to be determinative of the controlling issue here involved. Moreover, the record is silent in this respect. An examination of the order simply fails to show the action taken by the Interstate Commerce Commission with respect to the intrastate rates, the subject matter of the complaint. * * * in consequence, the findings of the Illinois Commission are wholly inadequate to support its conclusion that it lacked jurisdiction to grant the relief sought."

Section 65 of the Illinois Act[16] imposes an absolute mandate upon the Illinois Commission to make findings which support its ultimate conclusions. Such findings are jurisdictional in character, and in the absence or inadequacy of the same, the Commission has no jurisdiction or authority to enter an order. Thus, in declaring the order void on the grounds stated, the Supreme Court of Illinois merely held that the Illinois Commission was obliged to conform to the requirements of the Illinois Act respecting findings, and that in its failure to do so, its action in dismissing respondents' complaint could not be sustained. The Illinois Court's conclusion was manifestly premised on local law and practice, and this Court will neither review the facts *per se* upon the basis of which the Supreme Court of Illinois reached its conclusion nor the application it required nor the construction it gave to the Illinois Act in the aforesaid regard. *Cf. United States* v. *Johnson,* 268 U. S. 220; *King* v. *West Virginia,* 216 U. S. 92; *Christman* v. *Miller,* 107 U. S. 313; *post,* pp. 47-58.

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[16] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 69.

Moreover, the conclusion reached by the Supreme Court of Illinois follows the decisions of this Court on the subject. In *Wichita, R. & Light Co.* v. *Utilities Commission,* 260 U. S. 48, it was said (pp. 58-59):

> "This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission* v. *Springfield Gas & Electric Co.,* 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.,* 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.*" (Italics ours.)

See also: *United States* v. *Baltimore & O. R. Co.,* 293 U. S. 454; *Florida* v. *United States,* 282 U. S. 194; *United States* v. *Chicago, M. & St. P. R. Co.,* 294 U. S. 499; *Atchison, T. & S. F. R. Co.* v. *United States,* 295 U. S. 193.

The Illinois Act also requires (*a*) that an order of the Illinois Commission shall be based upon "the subject-

matter and facts inquired into," and (*b*) that any appeal from an order of the Illinois Commission "shall be heard on the record of the Commission as certified to by it." Ill. Rev. Stat. 1939, Chap. 111 2/3, Par. 72. It is thus evident (1) that the proof of record must sustain the Commission's action, (2) that that which is recited in the order as a basis for the decision must sustain the Commission's ultimate conclusion and action, and (3) that in considering the validity of an order the reviewing Court is confined to the order itself and the evidence of record before the Commission, that is, it may not take judicial notice of any essential fact. The Court may, of course, consider questions of law which is a judicial function.

Ostensibly, the basis of the Illinois Commission's disclaimer of jurisdiction was the *Chicago Producers case* (R. 10). As stated previously, however, the report and order in that case was not in evidence before the Illinois Commission. Commenting upon the decisions relied upon by petitioners to establish, and accepted by the Illinois Commission as showing, the terms and requirements of the alleged order of the Interstate Commission in the *Chicago Producers case,* the Supreme Court of Illinois stated preliminarily (R. 232-233):

> "In order to show that the State commission had been divested of jurisdiction over the intrastate commerce and rates involved in this proceeding it was essential, first, that the order of the Interstate Commission by which defendants assert the latter purported to assume jurisdiction over the subject matter be before the Illinois Commission. * * * In short, to establish their defense to the complaint, it was encumbent upon the defendants to prove the fact that an order had been entered in the *Chicago Producers case* on September 23, 1921, which contained findings having the legal effect attributed to them. The only

authoritative evidence of this requisite fact was the decision and order of the Interstate Commerce Commission itself."

In so holding, the Supreme Court of Illinois followed decisions of this Court in *Arkansas R. R. Commission* v. *Chicago, R. I. & P. R. Co.*, 274 U. S. 597, and *Illinois Central R. Co.* v. *Public Utilities Commission of Illinois*, 245 U. S. 493. In both of these latter cases carriers were seeking, like petitioners here, to increase intrastate rates upon the basis of orders allegedly entered by the Interstate Commission. But in neither instance did this Court permit the carriers, upon their own declarations, to escape the jurisdiction of a state commission and the exercise of its authority to protect intrastate shippers from excessive or illegal charges.

Continuing, the Illinois Court pointed out that if the Illinois Commission's order was premised on the *Chicago Producers case*, the said order was void because the decision in the latter case was not in evidence and the Illinois Commission could not, therefore, consider it. The Court said (R. 235-236):

"The decisive question is not whether an order was entered by the Interstate Commerce Commission but is, instead, whether the order of the Illinois Commerce Commission shows that such order was introduced as evidence at the hearing in the present proceeding and afforded a basis for its decision.

* * *

"Admittedly, the decision and order of the Interstate Commerce Commission was not offered or received in evidence. The Illinois Commission could not, therefore, consider it, as its order must be based on evidence presented at the hearing."

And quoting from another opinion previously rendered by it, the Illinois Court further said (R. 234)[17]:

> "The commissioners cannot act on their own information. Their findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or be considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such."

And in the preceding rulings the Supreme Court of Illinois strictly followed decisions of this Court on the subject. *Cf. United States* v. *Abilene & S. R. Co.*, 265 U. S. 274; *Chicago Junction Case*, 264 U. S. 258; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88.

While, as stated, the Illinois Commission ostensibly based its disclaimer of jurisdiction upon the requirements of the *Chicago Producers case*, it *actually* predicated its order upon *extraneous* statements and *dicta* culled from the reports in the *Chicago Gravel Co. case* and Ill. No. 10666 (Exhibit 7; R. 52, 165-196, 11-13). The Court held that the requirements and terms of the *Chicago Producers case* could not be established by statements from reports or orders in other cases, and that the cases from which the Commission quoted and upon which it relied did not, in fact or law, disclose the Commission's lack of jurisdiction or sustain its order in that regard. In its opinion, the Court said (R. 228):

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[17] This Court will, of course, recognize that the question presented in the case at bar is not whether a state commission can prevent a carrier from establishing rates validly prescribed by the Interstate Commission. Instead, as will be later developed, the issue of respondents' complaint was what rates **had been** established by publication of tariffs which had been lawfully filed and had become legally in effect. We draw this distinction: A rate may be prescribed by a commission, and in that view be legal, but, unless and until it is published in a tariff which becomes effective, it is not the legal or lawful rate for application to shipments. **Post**, pp. 49-56.

"The Commerce Commission reached the conclusion that the Interstate Commerce Commission did, in fact, assume jurisdiction over the traffic involved in this litigation. To support this finding it referred to its own order in Docket 10666 which cited the decision in *Chicago Gravel Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 118 I. C. C. 633, decided November 30, 1926."

Again, the Court stated (R. 233):

"The disclaimer of jurisdiction by the Commerce Commission rests upon *quotations* from an order in its own *Docket No.* 10666 and from a report from the Federal Commission in *Chicago Gravel Co.* v. *Atchison, T. & S. F. R. Co.*, 118 I. C. C. 633,—*not upon the actual decision* and order *in the Chicago Producers case. The orders in those two proceedings disclose that no issue was involved in either case concerning the legality of the Jones tariff rates or the effect of the successive suspension orders of the Illinois Commerce Commission relative thereto. Manifestly, quotations in orders from the cases referred to by the commission did not constitute a competent basis for its order. These extraneous statements showed neither that the Illinois Commission lacked jurisdiction of the complaint nor that the Interstate Commission had assumed or still had jurisdiction over the intrastate rates here involved.* Particularly pertinent is the observation of this court in *Atchison, T. & S. F. R. Co.* v. *Commerce Com.*, 335 Ill. 624, 638, 645: 'The statement in one case that the tribunal in another had stated a particular fact is no evidence in another controversy upon a different issue between different parties and in another tribunal of the correctness of the facts stated'." (Italics ours.)

Whereupon the Court concluded (R. 235):

"The Commission's action in entering an order unsupported by competent evidence was arbitrary and unreasonable in the extreme and is void."

The Supreme Court of Illinois based its conclusions in the preceding particulars on the following cited opinions of this Court:

*United States* v. *Abilene & Southern R. Co.*, 265 U. S. 274;

*Chicago Junction case*, 264 U. S. 258;

*Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88.

We briefly recapitulate: In rejecting the Illinois Commission's statement as to the effect or requirements of the *Chicago Producers case* the Supreme Court of Illinois held that since the order in that proceeding was not in evidence, the Illinois Commission had failed to conform to Section 65 of the Illinois Act requiring its order to be based upon evidence of record. In declaring that which the Commission set forth in its order to sustain its conclusion was incompetent to do so, the Supreme Court of Illinois was simply asserting what the most casual examination of the reports and orders, respectively, in the *Chicago Gravel Co. case* and in Ill. 10666 discloses. In concluding that the order was invalid for the reasons outlined the Court was otherwise merely applying an elementary principle of law that competent and substantial evidence is essential to sustain a verdict, judgment or decree—even an order of an administrative agency. *Cf. Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258; *Interstate Commerce* v. *Louisville & N. R. Co.*, 227 U. S. 88.

Respondents respectfully submit that what has been set forth discloses that the judgment of the Supreme Court of Illinois, insofar as, by affirming the order of the Circuit Court, it set aside the order of the Illinois Commission, is unassailable in this Court for the following reasons:

1. The question presented and decided related to the validity of a negative order entered by a state administrative agency and whether it conformed to requirements prescribed by the state law and other principles of state practice. Such a question is exclusively within the competence of a state court to resolve.

*Mobile, etc. R. Co.* v. *Mississippi,* 210 U. S. 187;
*Atlantic Coast Line* v. *North Carolina Corp. Com.,* 206 U. S. 1;
*Eastern R. Co.* v. *Littlefield,* 237 U. S. '40;
*Texas, etc. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426.

2. It does not appear from the judgment that a federal question was presented for decision, or that a decision of a federal question was necessary to the disposition of the case.

*Montgomery* v. *Hernandez,* 12 Wheat. 129;
*Arkansas Southern R. Co.* v. *German National Bank,* 207 U. S. 270;
*St. Louis, I. M. & S. R. Co.* v. *Taylor,* 210 U. S. 281;
*Cleveland & P. R. Co.* v. *Cleveland,* 235 U. S. 50;
*Williams* v. *Oliver,* 53 U. S. (12 How.) 111;
*Patterson* v. *Stanolind Oil & Gas Co.,* 305 U. S. 376;
*So. Western Bell Telephone Co.* v. *State of Oklahoma,* 303 U. S. 206;
*New York* v. *Maltbie,* 303 U. S. 158;
*Honeyman* v. *Hanam,* 300 U. S. 14.

3. It rests upon grounds wholly independent of a federal question.

*Williams* v. *Oliver,* 53 U. S. 111;
*Hancock National Bank* v. *Farnum,* 176 U. S. 640;

*Doyle* v. *Atwell*, 261 U. S. 590;
*Arkansas Southern R. Co.* v. *German National Bank*, 207 U. S. 270;
*Consolidated Turnpike Co.* v. *Norfolk, etc., R. Co.*, 228 U. S. 596;
*McCoy* v. *Shaw*, 277 U. S. 302;
*Klinger* v. *Missouri*, 13 Wall. 257;
*Delaware, etc. Nav. Co.* v. *Reybold*, 142 U. S. 636.

4. It merely resolves the power and authority of the Illinois Commission in relation to the Illinois Act and thus applies local law and practice, matters ordinarily not subject to review by this Court.

*Hibben* v. *Smith*, 191 U. S. 310;
*American Railway Express Co.* v. *Commonwealth of Kentucky*, 273 U. S. 269;
*Mobile, etc. R. Co.* v. *Mississippi*, 210 U. S. 187;
*Patterson* v. *Colorado*, 205 U. S. 454;
*Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission*, 206 U. S. 1;
*Central Vermont R. Co.* v. *White*, 238 U. S. 507.

5. The validity of the provisions of the Illinois Act not being in issue, if the judgment does in fact construe rather than merely give effect to and apply a state statute, the manner of construction in the present case does not present a federal question and is not open to review in this court.

*Commercial Bank* v. *Buckingham*, 5 How. 317;
*Grand Gulf R. Co.* v. *Marshall*, 12 How. 165;
*Supreme Lodge, etc.* v. *Meyer*, 265 U. S. 30;
*American Railway Express Co.* v. *Oyster Guano Co.*, 273 U. S. 274;
*Des Moines National Bank* v. *Fairweather*, 263 U. S. 105;
*Campbell* v. *California*, 200 U. S. 87.

6. In setting aside the order of the Illinois Commission, the action of the Supreme Court of Illinois amounted to no more than a reversal and remanding, action ordinarily not a proper subject for judicial inquiry by this Court.

*Schlosser* v. *Hemphill*, 198 U. S. 175;
*Houston* v. *Moore*, 16 U. S. (3 Wheat.) 433;
*Louisiana Nav. Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99;
*Washington* v. *Coats-Fordney Logging Co.*, 243 U. S. 251.

7. It results that no federal ground upon which a *writ of certiorari* may issue obtains.

*Klinger* v. *Missouri*, 13 Wall. 257;
*Browne* v. *Union Pacific R. Co.*, 267 U. S. 255;
*Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601;
*Dertoit & Mackinack R. Co.* v. *Paper Co.*, 248 U. S. 30.

*Second*: We come, then, to the final aspect of the judgment of the Supreme Court of Illinois. In addition to holding the Illinois Commission's order invalid, it was adjudged that the Illinois Commission had jurisdiction, that the Jones tariff rates were not legally applicable, that the exaction of said rates were illegal, and that accordingly the rates declared legally applicable and in effect should have been applied (R. 236-237). The issue before the Illinois Commission was simply, as the Court stated, (R. 231) not what rates may have been prescribed years ago, but "whether the correct and legal tariff rate had been applied."

That issue was equally simple of solution; to determine it required merely the ascertainment of whether during the period in question the Jones tariff rates had become

legally in effect, and if the described rates were not legally applicable, what the legal rates were. If the latter were less than the Jones tariff basis, it followed that respondents had been overcharged and were, on the general merits of the case, entitled to the relief prayed.

In the final analysis, as we propose to demonstrate, all that the Supreme Court of Illinois has done in the present regard is to simply require, in accordance with Illinois law, that the tariffs and rates lawfully on file with the Illinois Commission and legally in effect at the time shipments were made, be observed and applied.

The suspension orders entered by the Illinois Commission established that the Jones tariff did not become effective and that the rates therein contained, for the period September 10, 1925 to February 15, 1927, never became legally applicable (R. 216, 219; Exhibit 6, R. 51, 147-164). In its order of November 30, 1926, the Commission held (R. 157):

> "We further find upon this record that the rates published by the carriers are not justified and that the tariff should be permanently cancelled and stricken from the files of the Commission."

Thereafter, it was ordered that the Jones schedule, among others, "be, and the same are hereby cancelled, annulled and set aside and stricken from the files of the Commission" (R. 162). The proof is undisputed that the tariffs lawfully on file with the Illinois Commission at the time respondents' shipments were transported, named single line rates of 60 cents and connecting line switching charges of $3.60 per car upward (Exhibits 1 and 3, R. 211-213, 42-46, 52-53). It is, of course, axiomatic that when the Jones tariff and the increased rates therein set

forth were not permitted to be made effective that those tariffs and rates which the former schedule sought to cancel and supersede continued and remained in effect.

In commenting upon the question under consideration, the Supreme Court of Illinois stated (R. 227):

> "During the period between September 10, 1925, and February 15, 1927, the defendants exacted and collected the increased rates and charges for the transportation of complainants' [respondents'] carload shipments * * * from their plants * * * to all destinations on the lines of the defendants in the Chicago switching district as published in the tariff suspended by the Commerce Commission in its order No. 15539. It thus appears that between September 10, 1925, and February 15, 1927, the defendants did not comply with the Commission's suspension order but collected a rate of 65 cents per ton upon shipments from complainants' plants destined to deliveries in the Chicago District on the lines of the defendants, and where destined to points on connecting lines in the Chicago District, collected, as agent for the latter carriers, an additional charge of 30 cents per ton."

Again, the Court stated (R. 236):

> "We hold that the suspension of the Jones tariff of increased rates by the Illinois Commerce Commission was a valid exercise of its authority conformably to sections 36 and 37 of the Public Utilities act. The suspension orders were in effect during the period in question and intrastate shippers were entitled to the benefit of the prevailing lower rates under the suspension orders. It is conceded that defendants did not comply with the terms of these mandates. Since the legal rates were not applied to complainants' shipments they were entitled to reimbursements of the overcharges. The Circuit Court, it follows, properly reversed the decision of the commission to the contrary."

Section 37 of the Illinois Act[18] like Section 6 (7) of the Interstate Act,[19] provides in part:

> "* * * no public utility shall charge, demand, collect or receive a greater or less or different compensation * * * for any service rendered * * * than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file or in effect at the time. * * *"

Section 79 of the Illinois Act[20] makes it the duty of the Illinois Commission "to see that the provisions of the Constitution and statutes of this state affecting public utilities * * * are enforced and obeyed. * * *" And Section 1 provides that the provisions and requirements of the Act shall be "administered" by the Commission.[21]

In holding the Jones tariff rates illegal and that the rates contained in tariffs lawfully on file with the Illinois Commission at the time constituted the only legal and lawful basis of rates applicable to respondents' traffic, the Supreme Court of Illinois was simply enforcing the preceding mandates and requirements of the Illinois statute, and, by remanding the cause with directions, requiring the Illinois Commission to do likewise. Instead of committing error in that regard, the Supreme Court of Illinois strictly followed the decisions of this Court on the subject.

In *Armour Packing Co.* v. *United States*, 209 U. S. 58, this Court said concerning the duty of a carrier to observe rates named in tariffs lawfully on file and in effect (p. 81):

> "But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided

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[18] Ill. Rev. Stat. 1939, Chap. 111⅔, Sec. 37.

[19] C. 91, Sec. 411, 41 Stat. 483, 49 U. S. C. A., Sec. 6, Par. (7).

[20] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 83.

[21] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 1.

for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish."

In *United States* v. *Miller,* 223 U. S. 599, 602, 603, the ruling was to the same effect:

> "That the Act imposes upon common carriers subject to its provisions the duty of establishing in a prescribed mode the rates * * * to be charged for the transportation * * * and that the rates so established are obligatory alike upon carrier and shipper and must be strictly observed by both until changed in a mode prescribed, are propositions which are not only plainly stated in the Act, but settled in repeated decisions of this Court."

In *Minneapolis, St. P. & S. S. M. R. Co.* v. *Washburn-McKnight Coal Co.,* 254 U. S. 370, the Court said (pp. 371-372):

> "There was no contract, express or implied, on the part of the shipper to pay any rate other than that shown in the tariff filed and published according to law,—the Court saying on this point: 'Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement for publication becomes a mere trap for the unwary. *In our judgment it is wholly improper * * * for a Court to find that a shipper had in effect undertaken conditionally to pay according to a rate different from that published in compliance * * * with the statute'." (Italics ours.)

And in a companion case, *Minneapolis, St. P. & S. M. R. Co.* v. *Merrick,* 254 U. S. 376, 377, this Court sustained a judgment of the Supreme Court of North Dakota and the jurisdiction of that Court to enter it, awarding a shipper

restitution for the exaction of illegal rates where carriers, like petitioners, declined to observe the tariffs lawfully on file and rates legally in effect.

There is another reason why the judgment of the Supreme Court of Illinois in the particular under discussion is not, as petitioners claim, erroneous, and which is, namely, that a tariff and the rates therein named has, so long as it is in force and until legally superseded, the effect of a statute. In *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, this Court, among other things, said in such regard (p. 197):

> "*The statute required the carrier to abide absolutely by the tariff.* It did not permit the company to decide that it had charged too much and then make a corresponding rebate; *nor could it claim that it had charged too little, and insist upon a larger sum being paid by the shipper.* * * * *the tariff, so long as it was in force, was, in this respect, to be treated as though it had been a statute,* binding as such upon railroad and shipper alike." (Italics ours.)

It is elementary that a statute remains in force until repealed, and the act by which the repeal is accomplished becomes effective. It must similarly be true that a tariff remains in force until it is superseded by another tariff which becomes lawfully effective. In the present case, until the tariffs, rates and charges which the Jones tariff schedule sought to cancel were in fact and law superseded by the latter tariff, the former remained the legal and lawful rates. Here, the Jones tariff did not supersede the other tariffs and rates as of and prior to February 15, 1927, for the simple, yet conclusive, reason that it never became effective by virtue of the suspension orders entered by the Illinois Commission.

Petitioners' only answer (Pet. p. 41) is that, according to petitioners, in *American Express Co.* v. *Caldwell,* 244 U. S. 628, this Court held that a carrier was not obliged to observe rates lawfully on file with a commission and thereby legally in effect if there was an order of a commission requiring different rates. In other words, petitioners, asserting that the Illinois Court's conclusion was erroneous in that it held that rates legally in effect should be applied, attribute to this Court a holding that an order of the Interstate Commission, for example, is itself a sufficient basis for the imposition of intrastate rates irrespective of whether a tariff naming those rates has been filed and has become effective. But casual examination of the opinion in that case discloses no holding or rule to such effect.

The rule frequently announced by this Court is directly to the contrary. Thus in *Louisville & N. R. Co.* v. *Maxwell,* 237 U. S. 94, the Court, referring to the effect of Section 6 (7) of the Interstate Act which, like the Illinois Act, enjoins observance of rates "which are specified in the tariff filed and in effect at the time," stated (p. 97):

> "*Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge.* Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it. * * *
>
> "* * * *it is beyond the power of the carrier to depart from the filed rates,* * * *.*" (Italics ours.)

The decision in *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 156, 163, is to the same effect:

> "* * * *The legal rights of a shipper as against a carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate as*

> *between carrier and shipper.* The rates, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier. * * * This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." (Italics ours.)

No federal question is presented, it is respectfully submitted, where a state court (1) simply compels a state administrative agency to enforce statutory provisions comprehending the subject matter of complaint filed with it, and (2) merely requires on intrastate traffic the application of tariffs lawfully on file with the state commission and the rates contained in such tariffs legally in effect at the time shipments were transported.

Beyond doubt the requirement that intrastate rates legally in effect be applied does not conflict with the Federal Constitution or the Interstate Act for the fundamental purpose of all rate regulatory legislation is to require observance of charges contained in tariffs lawfully on file and in effect. And it is equally manifest that such a ruling does not and could not result in conflict with any decision of the Interstate Commission for no question as to any such decision is presented or involved in determining what tariff and rates are lawfully on file and in effect. Petitioners' claim that the Illinois Supreme Court improperly construed or failed to give effect to an order of the Interstate Commission is, in the face of the elementary propositions stated, utterly untenable in point of fact and is, indeed, a *reductio ad absurdum.*

Besides the considerations outlined, the ruling of the Supreme Court of Illinois in the respect presently under consideration relates to the remedy, and matters affecting

the remedy are governed by the law of the forum. A decision of a state court in that regard is not ordinarily reviewable by this Court. *Central Vermont R. Co.* v. *White,* 238 U. S. 507. There is in this regard, as before, no contention made by petitioners that any state statute is itself invalid, and, at best, all that petitioner's claims could amount to is no more than that the state law has not been correctly construed. But in a case like that at bar, the latter proposition presents no federal question and this Court will not usually judicially review the action of a state supreme court construing, by application, a state statute. *Commercial Bank* v. *Buckingham,* 5 How. 317; *Grand Gulf R. etc. Co.* v. *Marshall,* 12 How. 165; *Watson* v. *Maryland,* 218 U. S. 173; *Supreme Lodge etc.* v. *Meyer,* 265 U. S. 30; *First National Bank* v. *Ayers,* 160 U. S. 660; *Tampa Water Works* v. *Tampa,* 199 U. S. 241; *Hibben* v. *Smith,* 191 U. S. 310.

And the ruling of the Supreme Court of Illinois requiring the Illinois Commission to observe a local statutory mandate and procedure does not present a reviewable federal question. *French* v. *Hopkins,* 125 U. S. 524; *Central Vermont R. Co.* v. *White,* 238 U. S. 507.

In *Missouri Pacific R. Co.* v. *McGrew Coal Co.,* 256 U. S. 134, this Court held that the construction of a state statute by the Supreme Court of Missouri and the awarding of damages under such a construction did not, as carriers contended, violate rights secured to the latter by the Federal Constitution. In that regard, the Court observed (p. 135):

> "The objection now made, that the shipper did not pay freight charges, and therefore was not damaged, raised no substantial Federal question, but a question of state law, which we have no jurisdiction to review."

In a companion case, *Missouri Pacific R. Co.* v. *McGrew Coal Co.*, 224 U. S. 191, the question presented related to the exaction of illegal rates, and the action of the Supreme Court of Missouri, which affirmed the judgment of the lower Court, awarding the shipper restitution. Among other things, the defense was that the application of the state statute was in conflict with and repugnant to the Federal Constitution. This Court, however, declined to review, on the merits, the action of the State Court.

Furthermore, it was proper for the Supreme Court of Illinois to affirmatively determine the issue as to the illegality of the Jones tariff rates, for that question, like the construction of a tariff, is one of law. *Great Northern R. Co.* v. *Merchant's Elevator Co.*, 259 U. S. 285; *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Pennsylvania R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 120.

It is equally proper for the Illinois Supreme Court to consider the evidence, and, upon the basis thereof, remand the cause and require adherence to the proof, for the "legal effect" of evidence is a question of law. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88.

In addition, the points made previously, *ante*, p. 40, in respect of the validity of the Illinois Court's action in holding void the order of the Commission are here applicable.

There is no reviewable error in the decision of the Supreme Court of Illinois in the preceding particulars. That would still be the fact even if a federal question were presented, for the Illinois Court has, in every instance, followed the decisions of this Court on the subject.

### On the Merits, Petitioners' Claims Respecting an Alleged Jurisdictional Issue are Without Substance.

Doubtless what has been set forth is adequate to demonstrate that the petition herein discloses no real or genuine basis upon which the jurisdiction of this Court may be invoked. In order that there may be no doubt of that fact, we desire, in conclusion, to briefly consider the issue on its general merit and establish (*a*) that the proof shows that the Jones tariff is not responsive to any order entered by the Interstate Commission and that, therefore, the action of the Supreme Court of Illinois in holding that the Illinois Commission had jurisdiction of respondents' complaint was correct on the facts, and (*b*) that, as a matter of law, the Illinois Commission or the state courts, rather than the Interstate Commission, as the Illinois Commission held, are the only tribunals which would have jurisdiction in the premises.

Reduced to its essentials, petitioners' claim in this particular, which in reality is no defense to respondents' action, is that in the Jones tariff they were complying with the order allegedly entered by the Interstate Commission in the *Chicago Producers case*. They claim that either by the fixation of a relationship between intra- and interstate rates, or by the fixation of intrastate rates of a specific measure, the Jones tariff basis was required. The point we make in this regard is that if it be established that the described claims are erroneous and without substance, nothing that the Supreme Court of Illinois has done in its decision herein could possibly be held erroneous or present a question for review by this Court.

Both the Interstate Commission and the Illinois Commission have expressly denied petitioners' claims in the preceding regard. In the *Chicago Gravel Co. case* the Interstate Commission said (Exhibit 4, R. 51, 92-134, 104):

> "This general adjustment is set forth in a tariff known as Jones 420. * * * It was the culmination of a long series of conferences between the interested carriers and the shippers."

And in Ill. No. 15878, the Illinois Commission declared (R. 152)[22]:

> "As a result of these numerous conferences the carriers serving the Chicago Switching District published and filed with the several commissions B. T. Jones' Tariff 420, Illinois C. C. 171."

If it were true that the Jones schedule reflected rates prescribed, it is not clear how the rates therein contained could at the same time be the result of compromise and "a long series of conferences."

According to petitioners, the order in the *Chicago Producers case* became effective January 5, 1922 (Exhibit 1, R. 42, 211, 31). The legal presumption is that petitioners complied with the order on that date. We digress to observe that petitioners' representation that they were responding to the order some three years after its effective date, in rates published in the Jones tariff, is rather suspicious on its face. To continue: The evidence shows that on January 5, 1922, petitioners reduced the interstate rates from the outer-zone or Zone II from 4 cents to 3.75 cents per cwt. No change was made at that time in the intrastate rates from the inner or Zone I which were and remained 3.5 cents per cwt. Those rates reflected a differ-

[22] It is obvious, of course, that not all shippers agreed to the Jones Tariff for respondents, among others, protested the same and secured the suspension thereof (R. 216-219).

ential relationship of 5 cents (Exhibit 1, R. 42, 211). Since no intrastate rates were changed it is self-evident that the order in the case cited did not relate thereto.

For the purpose of the point, however, we may assume that both rates were prescribed in the *Chicago Producers case*. If they were so prescribed, the evidence establishes that the order in the *Chicago Producers case* was subsequently modified by *Reduced Rates, 1922,* 68 I. C. C. 676, decided May 16, 1922, and *Illinois Commission Order No.* R2251, dated June 20, 1922 (Exhibits 1 and 3, R. 42, 44, 211-213). Both orders were to the same effect. In the first, the Interstate Commission required, effective July 31, 1922, a general 10 per cent reduction in rates, including those applicable to sand and gravel. Applying that reduction to the inner or Zone I intrastate rates of 3.5 cents per cwt. in effect prior to July 31, 1922, results in a charge of 3.15 cents, which under the rule for disposition of fractions in turn results in a rate of 3 cents per cwt.

In other words, if it be assumed that the Interstate Commission prescribed in the *Chicago Producers case* an intrastate rate of 3.5 cents from the inner zone, that rate became, as a result of *Reduced Rates, 1922,* 3 cents. And that what we have stated is the actual situation is shown by the fact that petitioners, on July 31, 1922, published intrastate rates of 3 cents from the inner zone and a rate of 3.25 from the outer-zone, the latter reflecting a 5 cent differential over the inner zone adjustment (R. 211). The matter is simply a question of arithmetic.[23]

[23] In the **Chicago Gravel Co. case** it was suggested, by way of **dictum** (R. 104), that the inner zone rate, reduced by **Reduced Rates, 1922**, would be 3.25 cents per cwt. The Commission's statement is palpably erroneous since a rate of 3.5 cents reduced by 10% would result in a charge of 3 cents, as noted.

It follows that petitioners were not required, in the view most favorable to them, to maintain, or justified in exacting, a rate in excess of 3 cents per cwt., or 60 cents per ton from the inner-zone. Petitioners' claim, therefore, that the Jones tariff basis of 65 cents was required falls flat in the face of the proof. The very most that petitioners' could claim under the *Chicago Producers case,* with all the assumptions we have indulged, is that rates of 60 cents were established from respondents' plants. It results, therefore, that in holding the Illinois Commission had jurisdiction of respondents' complaint which alleged not that the 60 cent rates were illegal, but that the 65 cent rates were of that character, the Supreme Court of Illinois was correct as a matter of fact.

Moreover, it may be doubted that the defense of the *Chicago Producers case,* even if it prescribed the Jones tariff rates, would be tenable. The issue of respondents' complaint, if we may repeat, was that rates in excess of those legally in effect were exacted. The only competent defense thereto, we submit, would be a showing that the rates contained in tariffs lawfully on file with the Illinois Commission and legally in effect, were applied to respondents' traffic.

For, as this Court stated in *Davis* v. *Portland Cement Co.,* 264 U. S. 402, 425, the "statute required rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified."

And in *Armour Packing Co.* v. *United States,* 209 U. S. 58, 81, to which we have heretofore referred, it is said that a tariff and rate once in effect can be changed only in a manner provided by statute, which is the publication of another tariff containing different rates which are per-

mitted to become legally effective. *United States* v. *Miller*, 223 U. S. 599, 602, holds likewise, stating that a tariff and rate in effect can be changed only in the "mode prescribed". In *Louisville & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 97, this Court declared that only the tariff rate "duly filed" is the "lawful charge." The Jones schedule having not become effective, the tariff rates "duly filed" constituted the only "lawful charge" irrespective of any other consideration.

The point we make is that while a rate prescribed by a commission may be legal in the sense that it conforms to the requirements of reasonableness, etc., it is not the lawful rate for prospective application to shipments until it has been published in a tariff which has become legally in effect. Section 6 of the Interstate Act [24] and Sections 33, 35 and 37 of the Illinois Act [25] make that evident beyond question.

Furthermore, if the petitioners believed that the Jones rates were required by the Interstate Commission they should have presented such objection as they urge here to the Illinois Commission when it suspended the said tariff and rates. Or, if that procedure was not available, petitioners should have sought to enjoin the Illinois Commission from enforcing the suspension orders, or brought a mandamus proceeding to compel that Commission to permit the Jones tariff to become effective on intrastate traffic. *Cf. Illinois Central R. Co.* v. *Utilities Commission of Illinois*, 245 U. S. 493; *Arkansas R. R. Commission* v. *Chicago R. I. & P. R. Co.*, 274 U. S. 597. But as the Supreme Court of Illinois, in its decision herein, observed (R. 226):

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[24] C. 91, Sec. 411, 41, Stat. 483, U. S. C. A. Title 49, Sec. 6, Par. (7).
[25] Ill. Rev. Stat. 1939, Chap. 111⅔, Pars. 33, 35, 37.

"Defendants [petitioners], and, so far as the record discloses no one else, challenged the validity of the successive suspension orders."

Clearly, petitioners' application is without equity.

In the final analysis the spectacle presented here is that of petitioners ignoring the laws of Illinois, the suspension orders of the Illinois Commission, and, taking the law into their own hands, imposing rates they were bound, as a matter of law, to know had not been permitted to become effective, and were hence illegal. And petitioners did all this on their own declaration that the rates imposed had been prescribed by the Interstate Commission. They take the position that their mere assertion is conclusive, and they propose that it shall not be open to investigation or inquiry.

But respondents suggest the decisions of this Court will afford petitioners no justification for their action.

Thus in *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119, this Court under a similar fact situation held (pp. 124-125):

"The state authority, whose powers are invoked * * * is certainly entitled to be informed whether advantage has been taken of the situation * * *."

Again in *Western & A. R. Co.* v. *Georgia Public Service Commission,* 267 U. S. 493, it was declared (p. 496):

"* * * the commission was fully justified in refusing to sanction a discontinuance of service until a petition had been filed with the commission, and a showing made."

In the above case this Court characterized action like petitioners here have taken as "arbitrary and defiant."

And in *Wadley S. & R.* v. *State of Georgia*, 235 U. S. 651, it was held (p. 669):

> "*But where*, as here, *after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate, and available remedy by which it could test in the courts its validity, * * * it is subject to the penalty when that defense, as here, proved to be unsuccessful.*" (Italics ours.)

It would seem, moreover, that petitioners are in no position to challenge the decision of the Supreme Court of Illinois since the suspension orders of the Illinois Commission suspending and later setting aside the Jones tariff are, as already indicated, conclusive on the question of whether the Jones rates were legally applicable.

Which brings us to the final point we desire to note: Whether, as matter of law, the Illinois Commission had jurisdiction in the premises or whether, on the other hand, that jurisdiction resided in the Interstate Commission? The order of the Illinois Commission is of a very peculiar character: It holds (*a*) that the Illinois Commission had no jurisdiction to determine whether, from tariffs and rates lawfully on file with it and legally in effect, intrastate shipments were overcharged, and (*b*) that the Interstate Commission had jurisdiction of such a question (R. 17).

In its order the Illinois Commission does not find that the rates which respondents claim were legally applicable had been prescribed by the Interstate Commission. It does not find that such intrastate rates had been declared by the Interstate Commission unduly prejudicial or unjustly discriminatory against interstate shippers or interstate commerce. It does not find that the Jones tariff rates had been prescribed by the Federal Commission, or that they had

been required by that tribunal to remove undue prejudice or unjust discrimination, as aforesaid. It does not find that the Illinois Commission had jurisdiction to determine whether illegal intrastate rates had been exacted and then dismiss respondents' complaint on the ground that the legal rates had been applied. It does not determine what rates were legally applicable. It does not show how or why the Interstate Commission had jurisdiction. After finding or failing to find as above related, the Illinois Commission concluded that it had no authority to award reparation and over-ride an order of the Interstate Commission (R. 17). But there was no issue before the Illinois Commission seeking "reparation", that is, damages for the exaction of unreasonable or excessive rates (R. 21-29). In short, the Illinois Commission, without determining any essential fact to support its conclusion, simply asserted in a sweeping declaration that it was without any jurisdiction whatever in the premises.

The question arises if the Illinois Commission or state courts do not have jurisdiction of the subject matter of respondents' complaint, what tribunal, if any, does? Does the Interstate Commission possess jurisdiction to determine what intrastate rates are legal or whether illegal intrastate rates have been imposed on intrastate traffic?

The only power possessed by the Interstate Commission in respect of intrastate rates is that conferred by Sections 13 (4) and 3 (1) of the Interstate Act.[26] But those provisions confine the authority of the Interstate Commission to the removal of undue prejudice or unjust discrimination

[26] C. 91, Sec. 416, 41, Stat. 484, U. S. C. A. Title 49, Sec. 13, Par. (4); C. 91, Sec. 405, 41 Stat. 479, U. S. C. A. Title 49, Sec. 3, Par. 1.
It will be noticed that the petitioners do not rely upon either of these last mentioned statutory provisions, but keep referring to and relying upon Section 13 (3) of the Act, which only provides for a joint hearing and takes no jurisdiction from any state commission.

against interstate shippers or interstate commerce resulting from intrastate rates. There is no provision anywhere in the Interstate Act which authorizes the Interstate Commission to determine the reasonableness *per se* of an intrastate rate or adjudicate an issue relating to the exaction of illegal state rates on intrastate traffic. *Cf. Simpson* v. *Shepard,* 230 U. S. 352; *Florida* v. *United States,* 282 U. S. 194; *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298.

Now, although the Illinois Commission has attributed jurisdiction to the Interstate Commission and petitioners have asserted a proposition having the same effect, the Interstate Commission has itself denied that it possesses jurisdiction in respect of the intrastate rates to which respondents' complaint appertains. Such was what the Interstate Commission held in *Chicago Fire Brick Co.* v. *Chicago & N. W.R. Co.,* 123 I. C. C. 164, decided March 16, 1927. In that case a receiver, rather than a producer as is here the case, filed a complaint with the Interstate Commission relating to intrastate rates from the inner zone to the Chicago district for part of the period covered by respondents' complaint. The Interstate Commission dismissed the complaint holding (p. 164):

> "We are without authority in this proceeding to pass upon the lawfulness of the rates assailed from points in Illinois to complainants in the Chicago switching district, because those rates apply only on intrastate movement."

Unless, therefore, it is to be held that there is no forum to which respondents may appeal to determine whether illegal rates have been imposed on their intrastate shipments, the inexorable logic of the situation compels the conclusion that the Illinois Commission had jurisdiction as a matter of law.

We inquire, therefore, in conclusion: Where is there substance to petitioners' alleged errors? They allege that the Supreme Court of Illinois committed error in holding that the Illinois Commission had jurisdiction, but the facts of record, the law, and even the Interstate Commission itself supports the Illinois Court's conclusion.

Respondents respectfully suggest that this Court might well conclude that the petition herein is frivolous and essentially fictitious. *Cf. Millinger* v. *Hartupee*, 73 U. S. 258; *U. S. Fidelity & Guarantee Co.* v. *Oklahoma*, 250 U. S. 111; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Erie R. Co.* v. *Solomon*, 237 U. S. 427.

## Conclusion.

Petitioners have argued numerous other errors, but we think that, upon examination, it will be found that the Supreme Court of Illinois has done none of the things attributed to it by petitioners. We consider also that matters petitioners complain of do not constitute the basis of the Illinois Court's decision, but amount rather to the rejection of petitioners' contentions. In such circumstances respondents perceive no occasion to debate questions and issues which in no view could be controlling.

For the reasons heretofore set forth respondents respectfully submit that the petition for a *writ of certiorari* herein should be denied.

Respectfully submitted,

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